118-271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 203.

JOHN MULLAN AND FRANCIS AVERY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED MARCH 12, 1883.

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1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

The President of the United States of America to John Mullan and Francis Avery, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of August, A. D. 1878, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep'y Cl'k.*

Memorandum Pursuant to Rule 1, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of August next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep'y Clerk.*

2 U. S. MARSHAL'S OFFICE, *District of California.*

I hereby certify that I received the within subpœna on the 9th day of July, A. D. 1878, and personally served the same on the 9th day of July, A. D. 1878, by delivering to and leaving with John Mullan and Francis Avery, said defendants, personally, a certified copy thereof at the city and county of San Francisco, in said district.

San Francisco, July 10th, 1878.

A. W. POOLE, *U. S. Marshal*,
By D. W. C. STORY, *Deputy.*

Endorsed: Filed July 10th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

3. *Complaint in Equity.*

In the Circuit Court of the United States, Ninth Circuit, for the District of California.

THE UNITED STATES OF AMERICA
vs.
JOHN MULLAN and FRANCIS AVERY.

To the honorable judge of the circuit court of the United States, ninth circuit, for the district of California:

The United States of America, by Philip Teare, United States attorney in and for the district of California, brings this its bill of complaint against John Mullan, a citizen of the State of California, and Francis Avery, a citizen of the State of California.

And thereupon your orator complains and says:

I.

That the following-described tract of land, to wit, the north half of section eight (8), in township one (1) north, range number one (1) east, Mount Diablo meridian, situated in Contra Costa county, State of California, and containing three hundred and twenty (320) acres of land, is now, and since the acquisition of California by the United States has been, public land of the United States.

That said tract of land, and the whole thereof, contains mines of coal and other valuable minerals, and that the same is, and always has been, mineral land, and was and is of no value whatever for agricultural purposes, but is valuable solely and only for the
4 coal and minerals therein contained. That the matter in dispute in this action, exclusive of costs, exceeds the value of five hundred dollars.

II.

That the said tract of land and premises aforesaid were, on the thirtieth day of January, A. D. 1871, erroneously and wrongfully listed to the State of California by the United States, your orator, under the approval of the Secretary of the Interior of the United States, in list number nineteen of school indemnity selections, and in lieu of the east one-half of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian, and under the following circumstances and as hereinafter related, to wit:

That on the twenty-third day of August, A. D. 1868, the defendant, John Mullan, then and there well knowing that the said land and premises were mineral land, valuable solely for the coal and minerals therein contained, and designing and contriving unlawfully and fraudulently to obtain color of title thereto, applied to John W. Bost, then surveyor general of the State of California, under the provisions of an act of the Legislature of the State of California, entitled "An act to provide for the management and sale of the lands belonging to the State," approved March twenty-eight, A. D. 1868, to purchase and locate the said hereinbefore-described tract of land in

lieu of the east one-half of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian.

That on the 25th day of August, A. D. 1868, the said John W. Bost, surveyor general as aforesaid, accepted the said application of said defendant, John Mullan, upon the condition that if such
5 location should be made and approved by the United States, it should be for the use and benefit of the said Mullan, on his complying with all and singular the conditions of the said act of the Legislature of the State of California approved March twenty-eighth, 1868.

That afterwards, to wit, on the twenty-seventh day of April, A. D. 1869, the said John W. Bost, then being and acting as surveyor general of the State of California, certified that in accordance with the provisions of the said act of the Legislature of the State of California, approved March 28th, A. D. 1868, he had located as a portion of the school lands belonging to the State of California said three hundred and twenty (320) acres of public lands of the United States hereinbefore described, taken in lieu of the east one-half of section sixteen (16), township two north, range eight west, of Mount Diablo meridian, at the request and for the use of the said John Mullan.

That afterwards, to wit, on the twenty-first day of May, A. D. 1869, the said John W. Bost, then being and acting as surveyor general of the State of California and register of the State land office of the State of California, issued to the said defendant, John Mullan, a certain certificate of purchase, number nineteen hundred and thirty-five, from said State of California of said tract of land first herein described.

That afterwards, and on the application of the agent of the said State of California, to wit, on the third day of January, A. D. 1871, the said land and premises first herein described were erroneously listed as aforesaid by the United States to the said State of California, the same being embraced in list No. 19 of California school indemnity selections, approved January third, A. D. 1871, as aforesaid.

6 That afterwards, to wit, on the twenty-eighth day of March, A. D. 1871, the said John Mullan executed and delivered to the defendant, Francis Avery, a transfer and assignment in writing of his the said John Mullan's certificate of purchase, number nineteen hundred and thirty-five, of said tract of land first herein described, which had been issued by the State of California to him on the twenty-first day of May, A. D. 1869, as aforesaid.

That the said defendant, John Mullan, on the said twenty-eighth day of March, A. D. 1871, also by a certain instrument in writing, bearing date that day, sold, assigned, transferred, and set over to the said defendant, Francis Avery, all of his, the said John Mullan's, right or cause of action against the corporation known as the Black Diamond Coal Mining Company, or any other company, or person or persons, for or because of, or on account of any waste or injury committed upon said north one-half of section eight (8), township one (1) north, of range one (1) east, Mt. Diablo meridian, or for, or be-

cause of, or on account of the taking of coal therefrom or the taking of the rents, issues, profits, or esplees thereof.

Your orator further shows and complains that said assignment and transfer of the said certificate of purchase from the State of California, so made by the said defendant, John Mullan, to the said defendant, Francis Avery, was merely colorable, and that said defendant, Francis Avery, paid the defendant, John Mullan, little or no consideration whatever for said assignment and transfer, and that from that time the said Avery and the said John Mullan were
7 jointly interested in the said enterprise, and combined, confederated, and conspired together for the purpose of obtaining a patent from the State of California for the said land and premises.

That said defendants, and each of them, at the time of said assignment and transfer, well knew that the said land and premises were mineral and coal land of the United States, and as that, as hereinafter stated, the same could not be listed to the State of California by the United States or any of its agents or officers, and that a patent therefor could not lawfully issue to them, or either of them, by the State of California, and that the said defendants, and each of them, well knew that said land and every part and parcel thereof was not agricultural in its nature or quality, and could not be used for agricultural purposes, and that the same was solely and wholly valuable by reason of the coal and other minerals contained therein.

And your orator further shows and complains that afterwards, to wit, on the sixth day of April, A. D. 1871, letters' patent were issued from and by the State of California to the said Francis Avery, granting to him, the said Francis Avery, his heirs and assigns, the said north half of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian.

III.

And your orator further shows and complains that the said State of California claimed to locate and select said hereinbefore first described tract of land as school lands of the State of California,
8 under and by virtue of the provisions of the act of Congress of the United States, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3d, A. D. 1853, and did falsely represent and pretend by its agents and officers that said tract of land so located and selected was subject to such location and selection by the State of California under said act of Congress last hereinbefore mentioned and the laws of the United States thereto, and that upon such representations said State of California did procure wrongfully and to the fraud and injury of your orator the said listing of the same by the United States to the State of California.

That the Department of the Interior of the United States relied upon said representations and pretences so made as aforesaid by the officers and agents of the State of California, and erroneously supposed, or was induced to believe, that the said tract of land first herein described was subject to such location and selection by the

State of California, and that the State, under said act of Congress and the laws of the United States relating to such selections, was entitled to make such selection and location and to have the same listed to the State of California by the United States, and also that the same had not been reserved by the United States from such disposition, and was vacant, unappropriated public land, and of a character subject to be so selected, whereas all and singular said representations were false and untrue in point of fact, and so known to be at the time same were made by the agents or officers of the State of California making the same, and said land was not under the
9 laws of the United States subject to such location or selection, and the said State of California, under said act of Congress and the laws of the United States relating to such selections, was not entitled to make such location and selection, nor to have the same listed to it by the United States, and neither the Department of the Interior of the United States nor its officers or agents had lawful right or authority to list the same, or any part thereof, to the State of California.

IV.

And your orator further shows and complains that the allowance of said selection and location by the State of California of said tract of land first hereinbefore described, so made as aforesaid by the General Land Office and by the Department of the Interior of the United States, and the said listing of the same to the State of California by the United States, and the approval of the same by the Secretary of the Interior of the United States, and all and singular the acts pertaining thereto, were had and done unadvisedly through inadvertence and mistake, and without color of law, and contrary to the statutes of the United States in such case made and provided, and that said selection and location of said tract of land by the State of California and the listing of the same by the United States to the State of California was and were without authority of law, and that the same and all acts pertaining thereto then were, and now are, thereby null and void, and of no force and effect whatever, and for the following reasons, among others:

1st. That said tract of land is mineral land, containing valuable mines of coal and other minerals, and was known to be such
10 by the said defendant, John Mullan, and by the said John W. Bost, surveyor general of the State of California and register of the land office, at the time of such unlawful selection and location, and as such did not and could not pass to the State of California under and by virtue of the grants to the State of California for school purposes mentioned in said act of Congress, and last above referred to, or by any other act of Congress, and was not by any law of the United States subject or liable to be selected by the said State of California in lieu of any lands granted to said State for school purposes, or at all, and was expressly reserved from such location and selection and to and for your orator, the United States, under the act allowing such selections to be made.

2d. That said tract of land was surveyed in the month of March,

A. D. 1864, by the United States deputy surveyor, and that such survey was made without authority of law, and in direct violation of the provisions of the said act of Congress, approved March 3d, 1853, which provided that none other township than lines shall be surveyed where the lands are mineral, and that before any selection or location of said land and premises was made by the State of California the same had been and were reserved to the United States as coal lands, and there were, and now are, withdrawn from ordinary selection or disposal under and by virtue of the provisions of an act of Congress of the United States entitled "An act for the disposal of coal lands and of town property in the public domain," approved July 1st, 1864, and could only be disposed of agreeably to the provisions of that act.

3d. That the said tract of land first hereinbefore described, at the time of all and singular the proceedings hereinbefore recited, was and until the period hereinafter mentioned has been in the
11 possession of the Black Diamond Coal Mining Company, a corporation composed of citizens of the United States, and organized and existing under and by virture of the laws of the State of California.

That said land had so been in the possession of said corporation since the year 1861. That the said land and premises, at the time of the entry of the said corporation thereupon, which entry was made solely for mining purposes, was public mineral land of the United States, and unoccupied, except by those to whose occupation and possession said corporation succeeded for the purpose of mining thereon, and that said company has since continuously occupied said premises for coal-mining purposes until the date hereinafter mentioned.

That all and singular such acts of entry and occupation were acquiesced in by the United States, your orator, and recognized and permitted by the laws thereof, and particularly by the act of Congress approved March 3d, 1865, entitled "An act supplementary to the act approved July 1st, 1864, for the disposal of coal lands and of town property in the public domain."

That at the time of said unlawful selection of said tract of land by the said State of California there was a subsisting valid claim to the said land and premises held by the said Black Diamond Coal Mining Company, under and by virtue of the provisions of the said last-mentioned act of Congress.

That at the time of such unlawful selection of said tract of land by the said State of California the same was not subject to such selection by said State of California, for the further reason that the same was not then, and had not for a long time been, unappropriated public land.

12 4th. That the said State of California had, prior to the date of the approval by the Land Department of the United States of the said selection of the said north one-half ($\frac{1}{2}$) of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian, selected other lands as indemnity for the said east one-half ($\frac{1}{2}$), section sixteen (16), township two (2) north, range eight (8) west, Mount

Diablo meridian, to wit, the north one-half (½) of the northeast one-quarter (¼) and north one-half (½) of northwest one-quarter (¼) of section ten (10), township twenty-six (26) south, range thirteen (13) east, in lieu of the northeast one-quarter (¼) section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian, and the west one-half (½) of the southeast one-quarter (¼) of section four (4), and northwest one-quarter (¼) of northeast one-quarter (¼) and northeast one-quarter (¼) of northwest one-quarter (¼) of section nine (9), township twenty-six (26) south, range twelve (12) east, Mount Diablo meridian, in lieu of the southeast one-quarter (¼) section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian.

That said selections in lieu of the northeast one-quarter (¼) of said section sixteen (16) were approved and listed to the State of California by the United States under date of August 10th, 1870, some four or five months prior to the date of the approval of list number nineteen (19), and the said north one-half of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian.

5th. That said north one-half (½) section eight (8), township one (1) north, range (1) east, Mount Diablo meridian, so selected by the State as aforesaid, was double minimum land, situated and being on an even section on the line of the Central Pacific railroad, and within the limits of the withdrawal of January 30th, 1865,
13 and was not subject to such selection, the odd sections having been withdrawn nearly six months prior to the date of said State selection of said north one-half (½) of section eight (8), and the even or reserved sections were raised to double the ordinary minimum rate as required by law.

V.

And your orator further shows and complains that said defendants, Mullan and Avery, at the time of the making of the said unlawful selection by the State of California of said tract of land first hereinbefore described, and at the time of the making of said application to said surveyor general of the State of California to purchase and locate said land, and at all times succeeding, and when said tract was listed to the State as aforesaid and patented by the State to said Avery as aforesaid, had full, actual knowledge, information, and notice that the said tract of land was coal and mineral lands, containing coal fields, and that it was and had been for many years prior thereto, and then was, in the possession and occupancy of the said Black Diamond Coal Mining Company, and that said company was mining for coal upon said land, and that the same was mineral land and was not subject to such location, selection, and listing to the State as aforesaid, and that said land was reserved by the laws of Congress of the United States from such selection.

And your orator further shows and complains that, notwithstanding they and each of them well know the premises, they did combine and confederate together, and with other persons, whose names are to your orator unknown, for the purpose of unlawfully and fraudulently obtaining the title of the United States thereto, and

that for that purpose they did set on foot and promote, and by false representation assist in carrying out, all of said unlawful pro-
14 ceedings by which said tract of land was wrongfully and unlawfully listed to the State of California as aforesaid, and which resulted in the conveyance of the same by the State of California to the said defendant, Avery.

That the said defendant Mullan is interested with said Avery in said premises, and that they, and each of them, claim and pretend that by virtue of said proceedings the said Avery has a valid and subsisting title in fee in and to said premises, and every part thereof, and that neither said Avery nor the said Mullan will surrender the same to your orator.

And your orator further shows that a demand upon the State of California to surrender said list, number nineteen, for the purpose of cancelling the same, would be useless and unvailing, inasmuch as said State has conveyed said premises to said Avery as aforesaid, and cannot restore the same to your orator.

And your orator further shows that the said transfer, assignment, and conveyance by said Mullan of his said certificate of purchase, number nineteen hundred and thirty-five (1935), from said State of said tract of land first hereinabove described, and of his alleged rights of action against the Black Diamond Coal Mining Company to the said Avery, were and was not real and *bona fide*, but were and was only pretended and colorable and without any consideration moving from said Avery to him, said Mullan. That the object of the said Mullan and Avery in thus using the forms of law by which to procure the listing of the said tract to the said State of California, and the subsequent conveyance thereof by said State to said Avery, was only and solely to obtain a colorable title to said tract of land under which to harrass and among said Black Diamond Coal Mining Company by the institution of vexatious and expensive suits in the courts of the said State of California, in
15 the name of said Francis Avery against the Black Diamond Coal Mining Company, to compel said company to yield up to them, the said confederates, Mullan and Avery, its possession of said tract of land with their costly improvements thereon, and also to extort from said company large sums of money as damages for coal extracted and removed from said land by said company.

Your orator further shows that said Avery, after having fraudulently obtained said patent for said lands from the State of California, did bring and maintain an action in ejectment against the said Black Diamond Coal Mining Company for the possession of said land and premises, and did claim and allege in such action that the said Black Diamond Coal Mining Company had, prior to the granting of said patent to said Avery by the said State of California, removed from said lands coal of the value of one million three hundred and fifty thousand dollars ($1,350,000), and by means of said action did recover the possession of said premises on or about the sixth day of June, 1877, and compelled the said Black Diamond Coal Mining Company to pay to the said Avery as damages the sum of fifteen hundred dollars ($1,500), lawful money of the United States.

And your orator further shows that the said tract of land, by reason of its great elevation and its broken and rugged and rocky surface, is wholly unfit for agricultural purposes; that neither the said Mullan nor the said Avery, nor either of them, have or has ever resided or attempted to reside upon said tract of land, nor in the vicinity thereof; that from the natural features and characteristics of said tract of land the same has never been by said defendants, or either of them, utilized in any manner for agricultural purposes, and that the true character and classification of said land is and
16 always has been mineral land, and none other; that said tract of land was returned and classified as valuable coal land by the said United States deputy surveyor when he surveyed the same as aforesaid, in the month of March, A. D. 1864, and before said selection thereof by the State was attempted to be made, and while said company was in possession of the mine and engaged in the business of *bona fide* coal mining thereon for the purpose of commerce.

Your orator further shows that said Mullan and Avery never sought or attempted to procure any colorable title to said land by means of listing thereof to said State for the purpose of utilizing said tract for agricultural purposes, but solely for the purpose of securing it to themselves on account of the valuable minerals known by them, and each of them, to be discovered in said tract of land through the energy, perseverance, and expenditures of others whom they sought, and do now seek, to dispossess thereof by the unlawful listing of the said tract of land to the said State of California, and their subsequent acquisition of said title from the said State, as hereinbefore set forth and mentioned, and under and by virtue of said proceedings to secure to themselves the title of the United States to the said tract of land, in fraud of its rights and in violation of the statutes of the United States in such case made and provided.

VI.

And your orator further avers and shows that by reason of the premises the said listing of the said tract of land to the State of California as aforesaid, and all of the said proceedings in connection therewith had and made by the State of California, its officers and agents, and by the officers and agents of your orator, the United States, and by the said Mullan and by the said Avery, were and are, all and singular, null and void, but that the invalidity of the same
17 does not and cannot be made to appear upon the face of said list or in the record of said proceedings, or any of them, but can only be made to appear *aliunde* the said listing and the said proceedings; and that said proceedings apparently vest the legal title to said tract of land in controversy herein in the State of California and its said grantee, Francis Avery, and that the said unlawful listing of the said tract of land to the State of California, and the said conveyance thereof by the said State to the said defendant Avery, has cast a cloud upon the title of your orator, the United States, to said tract of land, and obstructs the free and clear alienation of the same by your orator.

And your orator further shows and alleges that in pursuance of the said conspiracy and confederation of the said defendants, Avery and Mullan, there is now pending in the State of California, in the district court of the fifteenth judicial district of said State, in and for the county of Contra Costa, an action at law, wherein the said Francis Avery is plaintiff, and the said Black Diamond Coal Mining Company is defendant, wherein the said Avery is now seeking to recover of the said Black Diamond Coal Mining Company a large sum of money, to wit, the sum of three million dollars ($3,000,000) for coal alleged by him to have been removed from said land and premises at some time between the tenth day of August, A. D. 1871, and the sixth day of June, A. D. 1877, and that, unless restrained by the order of this court from asserting title and claim to said land, they will prosecute said action, and may recover from said Black Diamond Coal Mining Company large sums of money by reason of and by means of said action, or compel said Black Diamond Coal Mining Company to pay the said defendant, Francis Avery, for his benefit and for the benefit of the defendant, John Mullan, large sums of money in compromise thereof, or in purchase of said pre-
18 tended title of said Avery to said land, created under and by virtue of the proceedings hereinbefore recited, and especially by reason of the patent issued to said Avery for said lands by said State of California, as hereinbefore recited.

VII.

All of which actings, doings, and pretences of the said defendants, and each of them, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator, and that your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relieveable.

Your orator further shows that the facts and circumstances hereinbefore recited and alleged were not discovered by your orator, the plaintiff, until long after the proceedings hereinbefore set forth, and not until one year next immediately preceding the presentation of this bill of complaint, such facts being derived from the records of the State of California, records of court, and living witnesses, and from other sources.

VIII.

And in support of the matters hereinbefore alleged your orator begs leave to refer first to the application for location under the State, to wit: Location number sixteen hundred and fifty-one (1651), dated August 23d, 1868, by John Mullan, and addressed to John W. Bost, surveyor general of the State of California; and also to the affidavit for location of said John Mullan, subscribed and sworn to by him August 24th, 1868; and also to the acceptance by John W. Bost, surveyor general of the State of California, of said application and affidavit, dated August 25th, 1868; and also the certificate of John W. Bost, surveyor general of the State of California, in respect

to said location number sixteen hundred and fifty-one (1651),
19 dated at Sacramento April 27th, 1869; and also to an assignment from John Mullan to Francis Avery, dated March 28th, 1871; and also the field notes of the United States surveyor who surveyed said land and premises in 1864, or thereabouts; and also to the letters patent from the State of California, issued April 6th, 1871, to Francis Avery for three hundred and twenty (320) acres of land, and being the land hereinbefore mentioned; and also to introduce testimony of witnesses and take and file depositions in support of any and all the allegations and averments in said bill mentioned and set forth, and such other evidence as may be necessary and available in the premises.

Wherefore your orator prays relief and the decree of this court, that the said listing of the said lands and premises by the United States to the said State of California and all the proceedings in relation thereto were obtained by fraud, and were without authority of law, and were and are absolutely null and void and of no effect whatever.

Also, that all the proceedings prior and subsequent thereto, whereby and in pursuance of which said letters patent of the State of California were issued to the said Francis Avery for the said lands and premises, were and are fraudulent and null and void, and that said letters patent of the State of California to said Francis Avery were obtained by fraud and mistake, and were and are null and void and of no effect, and that the said letters patent and all proceedings anterior thereto in respect of the same may be adjudged and decreed to be absolutely null and void and of no effect whatever, and that the said defendants, John Mullan, Francis Avery, and their assigns, and each of them, be forever estopped from asserting any title to the said lands under the said pretended location, listing, letters patent, or purchase or possession thereof; and that it may be adjudged and declared that the said lands and every part thereof always
20 were and now are public lands of the United States, and that pending this action, and until the final hearing thereof, and the final judgment and decree of the court therein, the said defendants, Mullan and Avery, and their agents and attorneys and servants be enjoined and restrained from selling, assigning, transferring, incumbering, or in any manner alienating said premises or any part thereof. And that upon the final hearing of this action said injunction be made perpetual, and that the United States may have such other and further relief in the premises as may seem to the court to accord with the principles of equity.

May it please the court to grant to the United States a writ of subpœna issuing out of and under the seal of this honorable court, directed to the said John Mullan and the said Francis Avery, commanding them, and each of them, on a day certain, to be named, to appear in this honorable court to answer all and singular the

premises, and to stand to and abide by and perform all such other orders and decrees as may be made herein.

(Am'dt. See order Oct. 7, '80.)

CHARLES DEVENS,
Attorney General.
By PHILIP TEARE,
United States Attorney for the District of California.

HOYT AND McKEE,
Special Attorneys and of Counsel.

Endorsed: Filed July 9th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'py cl'k.

21 *Demurrer.*

In the Circuit Court of the United States, Ninth Circuit, for the District of California. In Equity.

THE UNITED STATES OF AMERICA
vs.
JOHN MULLAN and FRANCIS AVERY.

The demurrer of John Mullan and Francis Avery, defendants, to the bill of complaint of The United States of America, complainant.

I. These defendants, by protestation, not confessing all or any of the matters and things in said complainant's bill of complaint contained to be true in such manner and form as therein set forth and alleged, do demur to the said bill, and for cause of demurrer shew that the said complainant has not by the said bill made such a case as entitles the complainant in a court of equity to any discovery from these defendants, or either of them, or any relief against them as to the matters contained in said bill, or any of such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any farther or other answer to the said bill; and they humbly pray to be dismissed from hence, with their reasonable costs in this behalf sustained.

22 II. And these defendants, by protestation, not confessing any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do farther demur to the said bill, and for cause of demurrer shew that it appears by the said complainant's own shewing in the said bill that the State of California, therein named, is a necessary party to the said bill, inasmuch as it is therein stated

that the listing of the said lands and premises and the proceedings in relation thereto, which the said complainant in his said bill prays may be decreed to have been obtained by fraud and to have been without authority of law, and that they were and are absolutely null and void and of no effect whatever, were obtained by the said State of California, and not by these defendants, or either of them; and it also appears therein that all the proceedings prior and subsequent thereto whereby and in pursuance of which letters patent of the State of California were issued to the said Francis Avery, which the said plaintiff seeks to have declared fraudulent, null, and void, were done by the said State, and the letters patent which he seeks to have declared null and void and of no effect, it therein appears, were issued by the said State; but yet the said plaintiff has not made the said State of California a party to the said bill. Wherefore, as before, these defendants do demur to said bill, and pray the judgment of this honorable court whether they shall be compelled to make any farther and other answer to the said bill; and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

III. And these defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner, sort, and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer shew that it does not appear anywhere in said bill by what right the said Philip Teare, United States attorney for the district of California, and Hoyt and
23 McKee, whose names are signed to the said bill as special attorneys and of counsel, present the said bill of complaint, or by what right they, on behalf of the United States, impeach the acts of the State of California in the selection, location, disposal, and patenting of the said land, or of the Hon. Secretary of the Interior in selecting and certifying the same. Wherefore, as before, these defendants do demur to the said bill of complaint, and pray the judgment of this honorable court whether they shall be compelled to make any farther or other answer to the said bill; and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

IV. And these defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the plaintiff's bill of complaint contained to be true in manner and form as the same are therein alleged, do farther demur thereto, and, for cause of demurrer, show that it appears by the said bill of complaint that the plaintiff has no interest or concern in the relief or discovery which is sought by said bill of complaint, but that the real party in interest in this suit, and at whose instance, and at whose expense, and for whose benefit the said bill is filed is the Black Diamond Coal Mining Company, and the said company is the real party in interest in this suit to obtain the discovery and relief sought by the said bill of complaint, but yet the said Black Diamond Coal Mining Company is not made a party to this suit. Wherefore, as before, the said defendants do demur to the said bill, and they pray the judgment of this honorable court whether they shall be compelled to make any

other or farther answer to the said bill, and that they may be hence dismissed, with their reasonable costs in this behalf sustained.

V. And these defendants, by protestation, not confessing all or any of the matters and things in the said plaintiff's bill contained to be true in such manner and form as therein set forth and alleged, do demur to the said bill, and, for cause of demurrer, show that the controversy which is presented by the said bill, and the true
24 cause of action therein alleged, is a matter solely between the said defendants and the Black Diamond Coal Mining Company, a corporation formed under the laws of California, and having its place of business and residence in said State, and all of said parties are citizens of the same State, and this court has no jurisdiction over the said parties, or over the said cause of action, or any controversy between these parties, touching said matter. Wherefore these defendants demur to the said bill, and pray the judgment of this honorable court whether they shall be compelled to make any other or farther answer to the said bill, and that they may be hence dismissed, with their reasonable costs in this behalf sustained.

VI. And these defendants, by protestation, not confessing all or any of the matters in the plaintiff's bill alleged in manner and form as the same are therein alleged and set forth, do demur to the said bill, and, for cause of demurrer, show that the matter which is alleged in the said bill as a ground of relief are matters of fact, touching the existence of particular facts in reference to the condition or location of the property, and officers of the plaintiff have been appointed by the plaintiff for the ascertainment of these matters in advance of the listing, who have passed upon them, and given their judgment; and it does not appear in or by said bill that there was any fraud, or any act done, or representation made by these defendants, or either of them, to any of said officers, or that the judgment or decision of any of said officers of the United States was induced by these defendants, or either of them, or by any one, or that the action, judgment, or decision of said officers, or any of them, was procured, induced, or influenced by these defendants, or either of them, or that there was any accident or mistake, or that these defendants, or either of them, had anything whatever to do with the listing of the said lands to the State of California. Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants
25 do demur to the said bill, and pray the judgment of this honorable court whether they shall be compelled to make any other or farther answer to the said bill, and that they may be hence dismissed, with their reasonable costs in this behalf sustained.

JOHN MULLAN,
Solicitor for Defendants.

In my opinion the foregoing demurrer is well founded in law.

B. S. BROOKS,
Of Counsel.

DISTRICT OF CALIFORNIA, } ss:
San Francisco, }

Francis Avery, being duly sworn, deposes and says: That the foregoing demurrer is not interposed for delay.

FRANCIS AVERY.

Subscribed & sworn to before me, this 29th day of August, 1878.
[SEAL.] SAM'L S. MURFEY,
Notary Public.

(Endorsed:) Service of a copy accepted this 30th day of August, A. D. 1878. Philip Teare, sol'r for compl't. Filed August 30th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

26 *Order Overruling Demurrer.*

At a stated term, to wit, the July term, A. D. 1878, of the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES }
vs. } No. —.
JOHN MULLAN *et al.* }

This cause herefore argued and submitted to the court for consideration and decision on the demurrer to the bill of complaint herein having been duly considered—

It is ordered that the demurrer be, and the same hereby is, overruled.

It is further ordered that the defendants have leave to answer herein on or before the next rule day on payment of twenty dollars.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 27th day of February, A. D. 1882.

[SEAL.] L. S. B. SAWYER, *Clerk.*

27 *Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

THE UNITED STATES OF AMERICA
vs.
JOHN MULLAN and FRANCIS AVERY.

These defendants now and at all times hereafter, saving and reserving to themselves all benefit of exceptions which may be had or taken to the plaintiff's bill of complaint for the many errors, imper-

fections, and insufficiencies therein, for answer thereunto as to so much thereof as they are advised it is necessary or material that they should make answer unto, answering, say:

I. They deny that the north half of section eight (8), in township one (1) north, range one (1) east, Mount Diablo meridian, is now, or at the time of the filing of the complaint herein, or since the thirteenth (13th) day of May, 1865, has been, public land of the United States.

They deny that said tract of land and the whole thereof contains mines of coal or other valuable minerals, or that the same is or ever has been mineral land, or was, or is, of no value for agricultural purposes, or that it is valuable only for the coal and minerals therein contained; but they admit that there was originally a bed of coal in a portion of said land, which the Black Diamond Coal Mining Company had in great part removed before the listing of said land to the State of California. They admit that the matter in dispute exceeds in value five hundred dollars.

28 II. They admit that the said tract of land was on the third (3d) day of January, A. D. 1871, listed to the State of California by the plaintiff; but they deny that it was so listed wrongfully or erroneously, and admit that it was listed with the approval of the Secretary of the Interior of the United States, in list number nineteen (19) of school indemnity selections, and in lieu of the east one-half (½) of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian; but they deny that it was under the circumstances stated in the complaint.

They deny that on the twenty-third (23d) day of August, A. D. 1868, the defendant, John Mullan, well knew that the said land and premises were mineral land, or valuable solely for the coal or minerals therein contained; or that he had any design or contrived unlawfully or fraudulently to obtain color of title; or that he applied to John W. Bost, then the surveyor general of the State of California, to locate the said hereinbefore-described tract of land, in lieu of the east one-half (½) of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian; but they admit that he did on that day apply to said Bost to purchase from the State said land; and they aver that said land had been so selected and located by the State upon the application of Frank Barnard, made on the thirteenth (13th) day of May, 1865; and they admit that the said surveyor general accepted the said application to purchase upon the conditions alleged in the complaint, and that he certified as alleged in the complaint, except that the said surveyor general did not certify that said land was public land of the United States; and he did farther certify that the location had been made in the name and for the benefit of the State of California, in the United States Land Office for the San Francisco district, in the city of San Francisco, and with the consent of John F. Swift, register of said district, bearing date the twenty-eighth (28th) day of May, A. D. 1865, and that the same was entered and numbered upon his register of

29 locations, and that the location was approved, and the treasurer was authorized to receive payment therefor; and they aver that the matters so certified were true.

They admit that a certificate of purchase was issued, as alleged.

They admit that, on the application of the agent of the State of California, to wit, on the third (3d) day of January, A. D. 1871, the said land and premises were listed by the United States to the said State of California, the same being embraced in list number nineteen (19) of California school indemnity selections, approved January third (3d), A. D. 1871, but they deny that the same were erroneously listed.

They admit the assignment of the certificate of purchase and the assignment of rights or causes of action by John Mullan to Francis Avery, alleged in the complaint, but they deny that said assignment and transfer of the said certificate of purchase from the State of California, so made by the defendant John Mullan to the defendant Francis Avery, was colorable, or that the said defendant Francis Avery paid the defendant John Mullan little or no consideration for said assignment and transfer, but said Avery paid a large and full consideration therefor; and they deny that they contrived, confederated, or conspired, but they admit that the defendant Avery paid the amount due on the certificate of purchase and demanded a patent, as in law he was entitled to do.

They deny that said defendants, or either of them, at the time of said assignments, knew that said land and premises were mineral or coal land, or of the United States, or that the same could not be listed to the State of California by the United States, its agents or officers, or that a patent therefor could not lawfully issue to them, or either of them, by the State of California; and they deny that they knew that said land, or any part or parcel thereof, was not agricultural in its nature or quality, or that it could not be used for agricultural purposes, or that the same was solely or wholly valuable by reason of the coal or other minerals contained therein. On the contrary, they aver that the said land and the whole of it is agricultural in its nature and quality, and can all be used for agricultural purposes.

They admit that, on the sixth (6th) day of April, A. D. 1871, letters patent were issued from and by the State of California to the defendant Francis Avery, granting to him, the said Francis Avery, his heirs and assigns, the said north half ($\frac{1}{2}$) of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian.

III. They admit that the said State of California claimed to locate and select said tract of land as school lands of the State of California, under and by virtue of the provisions of the act of Congress of the United States entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third (3d), A. D. 1853, but they deny that said State did, by its agents or officers, pretend that said tract of land, so selected and located, was subject to such selection and location by the State of California, under said act of Congress last hereinbefore mentioned and the laws of the United States in relation thereto, and they deny that such pretences, if made, were false, but aver that they were true, and they deny that said State

did, upon such representations, or any, wrongfully, or to the fraud or injury of the plaintiff, procure said listing.

They deny that the Department of the Interior relied upon said, or any, representations or pretences made by the officers or agents of said State, or that any were made, or erroneously supposed or were induced to believe that the said tract of land was subject to said location and selection, but they admit that said department did suppose and believe, and they aver that said department did adjudge and determine, that said land was subject to such location and selection by said State, and that said State, under said act of Congress and the laws of the United States relating to such selections, was entitled to make such selection and location, and to have the same listed to said State by the United States, and also that the same had not been reserved by the United States from such disposition, and was vacant, unappropriated public land, subject to be so selected, as it, in fact, was.

31

And they deny that such representations, if made, were false or untrue in point of fact, but aver that they were true; and they deny that the agents or officers of the State made any representations or knew anything about the matter further than they were informed by the records in the said department which were made by and in the custody of the officers and agents of the plaintiff; and they deny that said land was not, under the laws of the United States, subject to such location and selection, or that the said State, under said act and laws, was not entitled to make such location and selection and to have the same listed by the United States, but aver that it was subject to such location, selection, and listing; and they deny that the Department of the Interior of the United States, or its officers or agents, had not lawful right or authority to list the same, and the whole thereof, to the State, but aver that they had lawful right and authority so to do.

IV. And these defendants deny that the allowance of said selection or said listing, or the approval thereof by the Secretary of the Interior, or any of the acts pertaining thereto, were had or done unadvisedly, or through inadvertence or mistake, or without color of law or contrary to the statutes of the United States in such case made and provided, or that the selection or location of said tract of land by the State of California, or the listing of the same by the United States to the State of California, were or was, either of them, without authority of law, or that the same, or any acts pertaining thereto, were or now are null or void or of no force or effect, but these defendants aver that the said allowance of said selection and location, and the said listing of the same and the approval thereof by the Secretary of the Interior, and all and singular the acts pertaining thereto, were done advisedly, after full examination, with knowledge of all the facts and in strict conformity with the law and all the statutes of the United States in such case made and provided, and were done with full authority of law; were good and valid acts, and were and remain of full force and virtue.

32

They deny that said tract of land is mineral land, or that it contains minerals, or was known by said John Mullan or by the said

John W. Bost to be mineral land, or to contain valuable mines of coal or other minerals, at the time of such selection or location, or that as such it could not pass to the State of California under or by virtue of the grant to the State of California for school purposes, or was not subject or liable to be selected by the said State in lieu of any lands granted to said State for school purposes, or was reserved from such location to and for the plaintiff under the act allowing such selections to be made, but they aver that it was liable to be so selected, and was not reserved to the plaintiff.

They admit that said tract of land was surveyed in the month of March, A. D. 1864, by the United States deputy surveyor, but they deny that said survey was made without authority of law or in violation of the provisions of the said act of Congress of March third (3d), 1853; and they deny that before any selection or location of said land was made by the said State, or at any time, the same had been or was reserved to the United States as coal lands, and then were, or ever have been or now are, withdrawn from ordinary selection or disposal under or by virtue of the provisions of an act of Congress entitled "An act for the disposal of coal lands and of town property on the public domain," approved July 1st, 1864, or any other act, or could only be disposed of agreeably to the provisions of that act.

They have no knowledge nor information sufficient to found
33 a belief whether the said tract of land was, since the year 1861, or at the time of all and singular the proceedings hereinbefore mentioned, in the possession of the Black Diamond Coal Mining Company, and therefore they deny the same; but they admit that the said company was in possession at the date of the application of John Mullan to purchase the same, and for more than sixty (60 days before that, and continued in possession until the time alleged; and they admit that said company was and is a corporation organized and existing under and by virtue of the laws of the State of California; but they deny that it was during that time, up to the issuance of said patent, composed of citizens of the United States. They admit that at the time said corporation entered upon said lands they were public lands of the United States; that said corporation was made solely for mining purposes, and that said land was unoccupied, except by those to whose occupation and possession said corporation succeeded for the purpose of mining thereon, and that said company have continuously occupied it for coal mining purposes from the time of their entry until the date alleged, but these defendants deny that said land was mineral land, and they aver that the said corporation had no right to enter on said land, nor to occupy the same, nor to mine thereon.

They deny that all or any of the acts of entry or occupation by said corporation were acquiesced in by the United States, or recognized or permitted by the laws thereof by the act of Congress, approved March third (3d), 1865, entitled "An act supplementary to the act approved July first (1st), 1864, for the disposal of coal lands, and of town property on the public domain," or any other act or law.

They deny that at the time of said selection there was a subsisting valid claim to the said land held by the said Black Diamond Coal Mining Company, under and by virtue of the provisions
34 of the last-mentioned act or any other; or that said company had any claim thereto, legal or equitable, but aver they were mere trespassers on said land.

Further answering, they deny that at the time of said selection the said land was not then and had not for a long time been unappropriated public land, and they deny that said land had been or was appropriated in any way.

They deny that the said State of California had, prior to the date of the approval by the Land Department of the United States of the said selection, selected other lands as indemnity for the said east half (½) of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian; and especially they deny that said State had so selected the north half (½) of the northeast quarter (¼) and north half (½) of the northwest quarter (¼) of section ten (10), township twenty-six (26) south, range thirteen (13) east, in lieu of the northeast quarter (¼) of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian.

And they deny that said State had so selected the west half (½) of the southeast quarter (¼) of section four (4), and the northwest quarter (¼) of the northeast quarter (¼) and the northeast quarter (¼) of the northwest quarter (¼) of section nine (9), township twenty-six (26) south, range twelve (12) east, Mount Diablo meridian, in lieu of the southeast quarter (¼) of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian; and they deny that said selections in lieu of the northesast quarter (¼) of said section sixteen (16) were approved and listed to the State of California by the United States, under date of August tenth (10th), 1870, some four or five months prior to the date of the approval of list number nineteen (19), or at any other time, or at all.

But these defendants aver that duplicate selections were made by some one in the name of this State of the said tracts in sec-
35 tion ten (10), township twenty-six (26) south, range thirteen (13) east, in October, 1869, and in sections four (4) and nine (9), township twenty-six (26) south, range twelve (12) east, in December, 1869, in lieu of the east half (½) of section sixteen (16), township two (2) north, range eight (8) west, more than four years subsequent to the selection of the north half (½) of section eight (8), township one (1) north, range one (1) east.

A. M. Shanklin, formerly register of the United States land office in San Francisco, tried, in Washington, to have the first of the above duplicate selections approved, but his application was rejected, because it conflicted with the prior selection by the State of the said north half (½) of section eight (8). He then, while in Washington, amended his application by substituting the southwest quarter (¼) of section thirty-six (36), township twenty-nine (29) south, range twelve (12) east, for the northeast quarter (¼) of section sixteen (16), township (2) north, range eight (8) west, and engaging to correct the

record at San Francisco, had the selection approved as so amended on August tenth (10th), 1870.

The other duplicate selection above stated was abandoned and cancelled by the surveyor general of this State, and the said alleged selections, the west half (½) of the southeast quarter (¼) of section four (4) and the northwest quarter (¼) of the northeast quarter (¼) and the northeast quarter (¼) of the northwest quarter (¼) of section nine (9), township twenty-six (26) south, range twelve (12) east, were sold by the United States on the twenty-eighth (28th) day of November, 1870, to John Heriford.

They deny that said north half (½) of section eight (8) was double minimum land, or on the line of the Central Pacific railroad or within the limits of the withdrawal of January thirtieth (30th), 1865; and they deny that it was not subject to such selection, even if the odd sections had been withdrawn prior to the date of the State selection and the even sections raised to double the ordinary minimum rate, which they deny.

36 V. They deny that these defendants, or either of them, at the time of the making of the said selection by the State of California of said north half (½) of section eight (8), or at the time of making said application to said surveyor general of the State of California to purchase and locate said land, or when said land was listed to the State or patented by the State to defendant, Avery had full or any knowledge, information, or notice that the said tract of land was coal or mineral land or contained coal fields, or that it was or had been for many years prior thereto, or then was in the possession or occupancy of the said Black Diamond Coal Mining Company, or that said company was mining for coal upon said land, or that the same was mineral land, or that it was not subject to such location, selection, or listing to the State, or that the said land was reserved by the laws of the Congress of the United States from such selection.

They deny that they, or either of them, combined or confederated together, or with other persons, for the purpose of unlawfully or fraudulently obtaining the title of the United States thereto, or that for that or any other purpose, or at all, they did set on foot or promote or by false or any representations assist in carrying out all of said or any unlawful proceedings by which said tract of land was listed to the State of California, or that the same was, in any respect, wrongful or unlawful. But they admit that they, and each of them, do pretend that by virtue of said proceedings the said Avery has a valid and subsisting title in fee in and to said premises, and every part thereof, and that they will not surrender the same to the plaintiff.

And they admit that a demand upon the State of California to surrender said list number nineteen (19) for the purpose of cancelling the same would be useless and unavailing, and that said State has conveyed said land, the north half (½) of section eight (8)

37 to defendant Avery, and cannot restore the same to plaintiff.

They deny that said transfers and assignments by defendant Mullan to defendant Avery were, or either of them was, not real and *bona fide*, or were or was pretended or colorable, or without any consideration moving from said Avery to him, said Mullan, or that

the object of said Mullan and Avery in thus using the forms of law, by which to procure the listing of the said tract of land to the said State, and the subsequent conveyance thereof by said State to said Avery, was only or solely, or at all, to obtain a colorable title to said tract of land under which to harass or annoy the said Black Diamond Coal Mining Company by the institution of vexatious or expensive suits in the courts of the State of California in the name of said Francis Avery against the Black Diamond Coal Mining Company to compel said company to yield up to them its possession of said tract of land, with or without their costly improvement thereon, or to extort from said company large sums of money in damages for coal extracted or removed from said land by said company. But they aver that the said transfers were made in good faith and for a valuable consideration paid by the said Avery to the said Mullan at and before the time of the making thereof, in gold coin of the United States, with no other intent or purpose than the acquisition by said Avery of the title to said land, and with full faith that the title so acquired was valid, and unimpeachable, and they deny, thus defending, Avery fraudulently obtained said patent.

They admit that defendant Avery did institute suit in the fifteenth 15th) district court, with the allegations as averred, and did therein recover judgment against the said Black Diamond Coal Mining Company as alleged for the possession of said land and premises, and fifteen hundred dollars ($1,500) and no more damages and costs of suit, and that the said damages and costs were paid by the defendant therein, and that said Avery entered into possession under the said judgment, and is still in possession.

They deny that the said tract of land by reason of its great
38 elevation, or its broken or rugged or rocky surface, or otherwise, is wholly, or at all, unfit for agricultural purposes, and deny that its elevation is great or its surface broken, rugged, or rocky; but they admit that it is not level and more elevated than some other land, and there are places in it where there are rocks and where the surface is broken; but the said land, in the field-notes of the United States deputy surveyor, who surveyed the same, and which are on file in the office of the surveyor general for the State of California, is described as hilly land and rolling hills, and the soil as second rate, and this is a fair and just description of the land. And they admit that neither the said Mullan nor the said Avery have or has ever resided, or attempted to reside, upon the said tract of land, nor in the vicinity thereof; but they deny that from the natural features or characteristics of said tract of land the same has never been, by said defendants, or either of them, utilized in any manner for agricultural purposes, or that the true character and classification of said land is, or always has been, mineral land. On the contrary, the said defendants are, neither of them, farmers, but are engaged in other business which requires that they should reside with their families at San Francisco; and said land was returned by the surveyor who surveyed it as agricultural land, and it has never been classified otherwise in the field-notes or on the plaintiff's plats, or elsewhere, in any of the offices of the Land Depart-

ment of the United States; and said lands have been continuously used for pasturage ever since it came into possession of defendants.

They deny that said tract of land was returned or classified as coal land by the said United States deputy surveyor when he surveyed it in the month of March, A. D. 1864, or before said selection by the State was attempted to be made, or at any time; and they deny that said company were in possession of the same or engaged in the business of *bona fide* coal mining thereon at the time for the purpose of commerce, or at all.

They deny that said defendants never sought or attempted
39 to procure any title to said lands for the purpose of utilizing said tract for agricultural purposes, or solely for the purpose of securing it to themselves on account of the valuable minerals known by them, or either of them, to be discovered in said tract of land, or that they knew that such had been discovered through the energy, perseverance, and expenditure of others, or that they then sought, or now seek, to dispossess them thereof by any unlawful listing of the said tract to the State of California, or under or by virtue of any proceedings to secure to themselves the title of the United States to the said tract of land in fraud of its rights, or in violation of the statutes of the United States in such case made and provided.

VI. They deny that by reason of the premises, or for any reason, the said listing of the said tract of land to the State of California as aforesaid, or all or any of the said proceedings in connection therewith, had and made by the State of California, its officers, or agents, or by the officers or agents of the plaintiff, or by the said Mullan, or the said Avery, were, or are, all or singular, null or void; but they admit that the invalidity of the same does not and cannot be made to appear upon the face of said list, or on the record of said proceedings, or any of them; and they deny that it can be made to appear *aliunde* the said listing and the said proceedings. And they admit that said proceedings apparently (as they aver they do in fact) vest the legal title to said tract of land in controversy herein in the said State of California and its grantee, Francis Avery. And they admit that the title so vested obstructs any alienation of the same by the plaintiff; but they deny that said listing was unlawful, or that the conveyance thereof by the State to said Avery has cast a cloud upon the title of the plaintiff, or that the plaintiff has any title.

And these defendants admit that there is now pending in the said fifteenth (15th) district court such action as is alleged by Francis Avery against the Black Diamond Coal Mining Company for the cause of action alleged, and, unless restrained, he will prosecute said
40 action, and may recover from said Black Diamond Coal Mining Company large sums of money by reason of and by means of said action; but they deny that said suit is prosecuted in pursuance of any conspiracy or confederation of these defendants; and they deny that any order of this court to restrain them from asserting title and claim to said land could or should restrain the prosecution of said action; and they deny that the said action can compel said Black Diamond Coal Mining Company to pay these defend-

ants, or either of them, large or any sums of money in compromise thereof, or in the purchase of any pretended title.

VII. They deny that all or any actings, doings, or pretences of these defendants, or either of them, are contrary to equity or good conscience, or tend to the wrong or injury or oppression of the plaintiff, or that the plaintiff is entirely, or at all, remediless according to the strict rules of the common law, or can only have relief in a court of equity, or that matters of this nature are properly cognizable or relieveable therein. On the contrary, these defendants aver that if the allegations and pretences of the bill are true the plaintiff may, and ought to, recover the said land and the possession thereof by and according to the strict rules of the common law, and without resort to a court of equity, and they plead these facts to the jurisdiction of the court, and pray the same benefit and advantage therefrom as if the same had been separately and specifically pleaded.

They deny that the facts or circumstances recited and alleged in said bill of complaint were not discovered by the plaintiff until after the proceedings therein set forth, or not until one year next immediately preceding the presentation of the bill of complaint. On the contrary, these defendants aver that all of the facts touching the matters alleged were known to the plaintiff long before the listing of said land to the said State.

And these defendants, further answering, deny that this present suit is instituted by or by the authority of the plaintiff, or
41 that there is any law or statute authorizing the instituting of this suit by any officer or person whatever, and they allege that this suit is instituted on behalf of the Black Diamond Coal Mining Company in the name of the United States, and the only authority for the commencement thereof is a letter from the Attorney General of the United States to John M. Coghlan, Esq'r, United States attorney for the district of California, which is as follows:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, *June* 18, 1878.

"John M. Coghlan, Esq'r., U. S. attorney, San Francisco, Cal.

"SIR: I have received from the Sec'y of the Interior, in a letter of the 7th inst., an application from Messrs. Hoyt & McKee, of San Francisco, on behalf of the Black Diamond Coal Company, for permission to use the name of the United States in a suit to declare void the title of the State of California to the north ½ of section 8, in township 1 north, range 1 east, Mount Diablo meridian, Cal.

"After considering the facts in the application in connection with the views of the Secretary of the Interior, I have concluded that the application should be granted, and I have therefore to-day informed the representative of the company that such suit may be brought upon the understanding that any and all costs and expenses in the matter shall be defrayed by the applicants, and that the proceedings shall be subject to the direction and control of the Attorney General, in order that the interests of the Government may be fully protected and justice done to any and all parties interested.

"Very respectfully, CHAS. DEVENS,
"*Attorney General.*"

42 And these defendants aver that the said Black Diamond Coal Mining Company, called in said letter the Black Diamond Coal Company, has not shown, and has not, in fact, any privity with the Government in this behalf, and has no right, title, or interest, or estate, legal or equitable, in the said tract of land, and that the said letter does not, nor does any law or statute, authorize or sanction the institution of this suit or the filing of this bill of complaint, and they claim the same benefit and advantage hereof as if the same had been specifically pleaded.

And these defendants, further answering, insist that this court has no jurisdiction to determine any question of fact as to the character or condition of the land so selected by and listed to said State; that these matters have been already enquired into and finally passed upon by the officers and special tribunals in whom and in which this jurisdiction has been exclusively vested by the laws of the United States; that the certification thereof to the State on the third (3d) day of January, 1871, has by law all the force and effect of a patent; that before the signing thereof the said tract was carefully examined, and found to be free from conflict, and to enure to the State of California for the purposes indicated, and it was so certified by the chief clerk of the General Land Office, and it was certified by the Commissioner of the General Land Office, and was true that the said lot was embraced in the original list, then on file in said office, of land selected by the State as indemnity for deficiencies in the township named; that such indemnity school selection was authorized by the acts of Congress; that the said tract had been examined and compared with the township plat and tract book of said office, and that the indemnity was properly due to the township for which selected, was found to be subject to selection and free from conflicts, and he therefore recommended that the same be approved, subject to any valid interfering rights which might have existed at the date of the selection, and the same was so approved by the Secretary.

43 And defendants, farther answering, say that all the matters set forth in this bill of complaint, and the grounds therein alleged, for interferance, on the part of the United States, with the title of these defendants, were brought to the attention of the plaintiffs, and were enquired into at the instigation of the said Black Diamond Coal Mining Company, by the Commissioner of the General Land Office more than six years ago, and were finally determined by him on the fourteenth (14th) day of March, 1872, when the said Commissioner addressed and sent to the Governor of the State of California a communication or certificate in the words and figures following:

J. J. B.

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
"WASHINGTON, D. C., *March 14th*, 1872.

"His Excellency the Governor of California, Sacramento, Cal.

"SIR: Referring to our letter of Sept. 6, 1871, to your predecessor in office, requesting him to relinquish the N. ½ sec. 8, T. 1 N., 1 E.,

supposed to have been erroneously certified to the State in List No. 19 of school indemnity selections, approved Jan'y 3, 1871, I have now to state, from a further examination of the case, it is found that the allegation of facts, as set forth in that letter, were erroneous, and that there now appears to be no valid grounds for interference on the part of this office in the case. I have, therefore, to request that you will return the letter above referred to to this office, as the request therein contained is hereby withdrawn, and all action by this office as against the title of the claimant under the State subsequent to the certification of the tract is hereby rescinded.

44 "I have the honor to be, very respectfully, your ob't serv't,

"WILLIS DRUMMOND,

"*Commmissioner.*"

That no appeal was ever taken from this decision, and the plaintiff and the Black Diamond Coal Mining Company acquiesced therein for the space of over six years. And defendants aver that the matters of fact set forth in this bill were within the exclusive jurisdiction of the Land Department, as a special tribunal by law vested therewith, and the same were, by said tribunal, investigated and finally determined.

These defendants, further answering, say that the said north half (½) of section eight (8) was selected by the State on the thirteenth (13th) day of May, 1865, at the instance and request of the said Black Diamond Coal Mining Company, acting in the name of Frank Barnard, then secretary of said corporation.

The said selection was made in the United States land office, San Francisco, by the State locating agent, with the consent of the register of said land office, on June twenty-fifth (25th), 1865, and certified by said locating agent on the thirtieth (30th) day of June, 1865, and the application and certificate of location was received and filed in the office of the State surveyor general on the eleventh (11th) day of July, 1865, and approved by said surveyor general on August eleventh (11th), 1865.

That by the laches of the said company it and the said Barnard forfeited the right to purchase said land from the State on the first (1st) day of October, A. D. 1865; that thereafter the right to purchase the same from the State was open to all citizens of the State, and so remained down to August twenty-fifth (25th), 1868, when the defendant, John Mullan, applied to purchase the same, and his application was accepted; and the defendants insist that the said corporation, in whose behalf this suit is prosecuted and the real plaintiff herein, having procured said land to be selected by the State,

45 is estopped to allege that said land was not open to such selection, or not lawfully selected by the State.

And defendants further say that when the application of defendant Mullan was made it was known and understood by him and by the State of California that it was simply an application to purchase a tract of land which had already been selected and located on behalf of the State three years previously, and which had been for sale all that time; that the State did not then, nor at any

other time than in May, 1865, select and locate said land; that the State had provided certain blank forms to be filled in and used upon applications to locate and select indemnity lands under the act of the Legislature of said State, approved March twenty-eighth (28th), 1868, but had not provided blanks to be used upon the application for the purchase simply of such indemnity selections, and the said Mullan, in making his application, used one of said blanks so provided, striking out portions thereof and interlining and altering the same, and the language of the application was not precisely the same as it would have been if such blanks had not been used.

Defendants aver that the Hon. John F. Swift, who, at the date of the selection of said north half (½) of section eight (8), was register of the United States land office in the San Francisco land district, acted in good faith, and with full knowledge of all the facts; that Leander Ransom, now dead, then the State locating agent, made said selection in good faith without any false representations or misrepresentations or any representations of any kind, farther than to present the fact of such selection by the State; that he did not practice any imposition of any kind upon the United States, or upon any of its officers or agents, in relation to said land or the selection thereof; that neither the United States nor any of its officers or agents were at any time misled or imposed upon in any manner whatever by any agent or officer of the State of California, or by any other person whomsoever, in any matter relating to said north half (½) of said section eight (8), or the selection thereof, nor by these defendants or either of them, nor was any representation made by any of them to the United States, her officers or agents;

46 that the United States and the officers thereof were the sole and exclusive custodians of all the facts of the surveys and field-notes, and in possession of the data in relation to all of said matters, and did not rely upon any representations or pretences of the State of California, her officers or agents, in relation thereto, nor were induced to act or influenced in their action in consequence of any such, but all the information which the State, her officers and agents, had on the subject were derived from the officers and agents of the United States; nor did said officers and agents act under mistake or through inadvertence, but they acted with full information and due diligence and advisedly, and there is no newly-discovered evidence nor any fact discovered which was not fully known to said officers at the time of their said action.

That the said defendant, John Mullan, found said land for sale by said State, and as a citizen of said State he applied to purchase the same; that he did not have any knowledge then, or at any time subsequent, prior to the listing thereof, that the Black Diamond Coal Mining Company, or any one else, set up any claim to title to said lands under any law of the State or of the United States, nor did he know that said land contained coal; that all his acts in relation thereto were open, of public record, and above board; that he confederated or conspired with no one, and made no representations whatever; that he paid the State with his own money, and that all of his acts were in good faith, and had and done in his own name

and for his own benefit; that nearly one year elapsed between the date of filing his application to purchase said tract of land and the receipt by him of a certificate of purchase therefor, and when he received it he was the sole owner and holder thereof, and he used it as security in many business and commercial transactions with divers persons and corporations, including defendant Avery, for nearly three years before he sold said land and assigned said certificate to defendant Avery; that during all this time he did not know that the Black Diamond Coal Mining Company had or made any claim to said land or that any person was trespassing or
47 mining thereon; that he had never seen said land, never been thereon, nor within many miles thereof, and he denies each and every the allegations of fraud or fraudulent knowledge, or conspiring or designing or contriving, or malintent or imposition upon the United States, or upon any of its officers or agents, and all unlawful action or unlawful or wrongful transactions alleged or insinuated against him either in regard to the selection of said land or the approval thereof, or his application to purchase, or the acceptation thereof, or the issuance to him of the certificate of purchase, or the certification of said land by the United States to this State, and had nothing whatever to do with said certification.

That the defendant Avery was a resident of the city of New York when the said Frank Barnard made his application for and caused the said north half (½) of section eight (8) to be selected and located by the State of California, through her locating agent; that he did not come to and arrive in this State until the month of December, 1868, more than three months after defendant Mullan had made his application to the State of California to be allowed to purchase the said tract of land; that he did not make the acquaintance of defendant, John Mullan, until about the month of August, 1869; that he never heard or knew of the north half (½) of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian, until the month of March, 1871, when the defendant, Mullan, offered him the certificate of purchase issued to him, the said Mullan, by the State of California as security for a loan of money, and said the land had been listed to the State in the preceding month of January.

And defendant, Francis Avery, further answering, says that all and singular the allegations and averments of this bill of complaint, charging, alleging, intimating, or insinuating that he, the said Avery, conspired, confederated, or colluded with any one whomsoever, or any person or persons whomsoever, or influenced, or sought, or caused, or procured to be influenced, or misled, or deceived, or imposed upon any officer or officers, agent or agents, of the State of California, or of the United States, the plaintiff herein, in or about, or in connection with, or in relation to the selection and location of the said north half (½) of section eight (8), township one (1)
48 north, range one (1) east, Mount Diablo meridian, the issuance of a certificate of purchase therefor to the said John Mullan, defendant herein, the certification or listing of the said tract of land by the United States to the said State of California, are wholly and

absolutely untrue, and without any foundation whatever, and he denies the same.

And defendant, Francis Avery, further answering, says that at the time when the State certificate of purchase for the said north half of section eight (8) came into his possession as security for money loaned to John Mullan, he had no knowledge, or any means of knowing, that the Black Diamond Coal Mining Company, or any other corporation or person or persons, were then, or ever had been, trespassing and depredating on said land, or had, or pretended to have, or could have, any claim, or any pretence of a claim, to any title thereto, nor did he learn that any one had been or was mining on this north half of section eight (8) until after defendant, John Mullan, had sold, and he, defendant Francis Avery, had purchased and paid for this land.

And these defendants, further answering, say that the whole of said township one (1) north, range one (1) east, Mount Diablo meridian, was sectionized when it was surveyed in 1864, except a small portion which was not surveyed simply because it was mountainous, and worthless for any purpose; and the whole, or a great part thereof, has been conveyed by the United States to divers parties, some to the Western Pacific Railroad Company, some to pre-emptors, some to locators of military bounty land warrants, some under the homestead law, some to locators of school land warrants and Agricultural College scrip, some under the university grant, and some under the grant of sixteenth and thirty-sixth sections and of indemnity lands therefor, as may be seen from the following table copied from the records of the United States Land Office, in San Francisco, covering the two northern tiers of sections in township one (1) north, range one (1) east, the only ones containing coal, and showing the disposition made by plaintiff of the first twelve (12) sections in said township:

Section one.

Northwest quarter. Western Pacific Railroad Company. April 3, 1872. List 8.

49 East half and southwest quarter. Western Pacific Railroad Company. May 31, 1870. List 5.

Section two.

North half. State selection. May 16, 1864. Approved April 2, 1870. List 13.

South half. State selection. August 17, 1864. Approved July 1, 1870. List 15.

Section three.

Northeast quarter and north half of southeast quarter. Western Pacific R. road. May 31, 1870. List 5.

Northwest quarter. Western Pac. R. R. December 24, 1872. List 9.

South half of southeast quarter. Coal application of F. K. Shattuck. February 15, 1871.

North half of southwest quarter. Coal application. Cancelled.

Southeast quarter of southwest quarter. Coal application. Rejected.

Southwest quarter of southwest quarter. Coal application of E. C. Clark. May 11, 1868.

Section four.

Northeast quarter. Military bounty warrant. Nicholas Smith. May 21, 1866.

Northwest quarter. Military bounty warrant. William Prosser. October 8, 1872.

North half of southeast quarter. State selection. May 16, 1864. Approved, July 1, 1871. List 22.

Southeast quarter of southeast quarter. Coal application. E. C. Clark. May 11, 1866.

Southwest quarter of southeast quarter. Coal application. H. S. Hawxhurst. June 16, 1866.

Southwest quarter. Coal application. S. B. Whipple. August 31, 1866.

50 Section five.

Northeast quarter. State selection. May 16, 1864. Approved November 15, 1871. List 23.

Northwest quarter. State selection. May 16, 1864. Approved July 1, 1871. List 22.

Southeast quarter. Western Pacific Railroad Company. May 24, 1872. List 9.

South half. State selection. May 19, 1864. (Seems to be still pending.)

Section six.

Northeast quarter of the northeast quarter and the south half of northeast quarter. State selection. February 25, 1864. Approved July 1, 1871. List 22.

Northwest quarter of the northeast quarter. University of California. October 5, 1872. Approved December 6, 1873. List 3.

Northwest quarter (lots 1 & 2). Cash sale. James L. Lendrum. May 6, 1873.

Southeast quarter. School land warrant. May 16, 1864. Approved April 8, 1867.

Southwest quarter. 3 coal applications. Unsettled.

Section seven.

Northeast quarter. School land warrant. May 16, 1864. Approved April 8, 1867.

Northwest quarter. State selection. December 10, 1864. Declaratory statement. Henry Brown. April 4, 1865; and two coal applications, No. 4 & No. 11.

Southeast quarter. Western Pacific Railroad. December 24, 1872. List 9.

51 Southwest quarter (lots 1 & 2). Declaratory statement. Robert Watson. August 1, 1870.

Section eight.

North half. State selection. May 13, 1865. Approved January 3, 1871. List 19.

Southeast quarter. Military bounty warrant. Peter Vestneys. January 28, 1873.

Southwest quarter. State selection. February 28, 1865. Approved January 30, 1868. List 2.

Section nine.

Northwest quarter of northeast quarter. Western Pac. R'road Co. December 24, 1872. List 9.

Northeast quarter of northeast quarter. Coal application of E. C. Clark. May 11, 1866.

South half of southeast quarter. Western Pac. R'road Co. December 24, 1872. List 9.

South half. Western Pac. R'road Co. May 31, 1870. List 5.

Section ten.

North half of northeast quarter. Coal application of F. K. Shattuck. February 15, 1871.

South half of northeast quarter. State selection. May 15, 1864. Approved April 18, 1873. List 26.

Southeast quarter of northwest quarter. State selection. May 16, 1864. Approved April 18, 1873. List 26.

Northeast quarter of northwest quarter. Coal application. William Hillegas. July 28, 1868.

Northwest quarter of northwest quarter. Coal application. E. C. Clark. May 11, 1868.

Southwest quarter of northwest quarter. Military bounty warrant. Thomas Vivian. June 1, 1878.

52 North half of southeast quarter. Homestead. W. B. Stewart. March 17, 1873.

Southwest quarter. Agricultural College scrip. Jos. Harris. March 12, 1873.

Section eleven.

North half. School land warrant. May 16, 1864. Approved April 8, 1867.

Southeast quarter. Homestead. Patrick Corcoran. November 10, 1869.

Southwest quarter. State selection. May 16, 1864. Approved July 1, 1870. List 15.

Section twelve.

Northeast quarter. Declaratory statement. Martin Flynn. October 24, 1870.

Southeast quarter. Declaratory statement. Patrick Griffin. January 25, 1870.

North half of northwest quarter, southwest quarter of northwest quarter, west half of southwest quarter. School land warrant. May 16, 1864. Approved April 8, 1867.

East half of southwest quarter, southeast quarter of northwest quarter. School land warrant. May 16, 1864. Approved October 17, 1861 (71?). List 22.

And these defendants deny all unlawful combination and confederacy in the said bill charged, without —, that any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants.

All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in that behalf most wrongfully sustained.

53 FRANCIS AVERY.

JOHN MULLAN,
In Pro. Per., and Sol. for D'f'd't Avery.
B. S. BROOKS,
Of Counsel.

DISTRICT OF CALIFORNIA, } *ss:*
San Francisco, }

Francis Avery, being duly sworn, deposes and says: That he is one of the defendants in this cause; that he has read the foregoing answer, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

FRANCIS AVERY.

Subscribed and sworn to before me this 18th day of November, A. D. 1878.

[SEAL.] SAM'L S. MURFEY,
Notary Public.

(Endorsed:) Due service of a copy of the foregoing answer and receipt of ($20) twenty dollars hereby admitted, at San Francisco, this 18th day of November, A. D. 1878. Philip Teare, United States att'y. Filed 18 November, 1878. L. S. B. Sawyer, clerk.

54 *The Replication of The United States, Complainant, to the Answer of John Mullan & Francis Avery, Defendants.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES *vs.* JOHN MULLAN and FRANCIS AVERY.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver, maintain, and prove said bill to be true, certain, and sufficient in the law

to be answered unto, and that said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true.

All of which matters and things this repliant avers, and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by its said bill it has already prayed.

PHILIP TEARE,
U. S. Att'y.

HOYT & McKEE,
Solicitors for Complainant.

Endorsed: Service of a copy of within replication admitted, this 2d day of December, A. D. 1878. John Mullan & B. S.
55 Brooks, def't's att'ys. Filed Dec. 2d, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y cl'k.

56 At a stated term, to wit, the February term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Decree.

THE UNITED STATES OF AMERICA *vs.* JOHN MULLAN *et al.*

The complainant herein filed its bill of complaint, which is hereto annexed on the 9th day of July, A. D. 1878.

Thereupon a subpœna to appear and answer herein was issued, returnable on the first Monday of August, A. D. 1878, and service thereof made upon the defendants prior to the return day thereof. Said subpœna with the marshal's return of service is hereto annexed.

The defendants appeared herein by John Mullan, Esqr., as their solicitor, and on the 30th of August, A. D. 1878, filed a demurrer to said bill of complaint; said demurrer was overruled October 14th, A. D. 1878. A certified copy of the order of court overruling said demurrer is hereto annexed.

On the 18 day of November, A. D. 1878, an answer to said bill of complaint was filed, which answer is hereto annexed.

A replication to said answer was filed on the 2d day of December, A. D. 1878, which replication is hereto annexed.

Thereafter a final decree was filed and entered herein in
57 the words and figures following, to wit:

At a stated term of the circuit court of the United States of

America for the district of California, held at the court-room in the city and county of San Francisco.

Present: The Honorable Lorenzo Sawyer, judge.

THE UNITED STATES
vs.
JOHN MULLAN and FRANCIS AVERY. } No. 1939.

This cause came on to be heard at the February term, 1881, of this court, and was argued by counsel and taken under advisement by the court, and now on this day it is ordered, adjudged, and decreed as follows, namely:

That the following-described tract of land, to wit, the north half of section eight (8), in township one (1) north, range number one (1) east, Mount Diablo meridian, situated in Coutra Costa county, State of California, and containing three hundred and twenty (320) acres of land, is now and at all the times mentioned in the plaintiff's bill of complaint in this action it was public land of the United States, and always has been during said times mineral land containing known mines of coal.

That the said tract of land and premises aforesaid having
58 been unlawfully selected by the State in lieu of certain unavailable school lands hereinafter mentioned were on the thirtieth day of January, A. D. 1871, erroneously and by mistake and inadvertence wrongfully and unlawfully listed to the State of California under the approval of the Secretary of the Interior of the United States in list number nineteen (19) of school indemnity selection, and in lieu of the east one-half of section sixteen (16), township two (2) north, range eight (8) west, Mount Diablo meridian.

That the said lands were not subject to such selection or to be listed to the State in lieu of said school land, and by reason thereof the State of California never had or acquired in any manner any lawful title to the land and premises herein above described. That the letters patent of the State of California issued to Francis Avery on the sixth day of April, A. D. 1871, granting to him, the said Avery, his heirs and assigns, the said north half of section eight (8), township one (1) north, range one (1) east, Mount Diablo meridian, and all and singular the proceedings had and taken by John Mullan and by the said Francis Avery for the purpose of acquiring the right to have said patent issued to said Avery as aforesaid, were and each of them were had and done without authority of law, and were and are, each of them was and is, illegal and utterly void, as against the United States, said complainant and all parties deriving title from said complainant herein.

It is further ordered, adjudged, and decreed that the said selection, listing over to the State and the said patent issued thereon be, and the same are hereby, vacated, set aside, cancelled, annulled, and declared void.

And it is further ordered, adjudged, and decreed that the
59 said defendants, and each of them, have and has no lawful right, title, or interest in or to the said land and premises

above described as against the United States, complainant herein, by virtue of said letters patent of the State of California, and the proceedings upon which the issue of the same to Francis Avery was based; and that the said defendants, John Mullan and Francis Avery, and their assigns, and each of them, be, and they hereby are, enjoined from asserting any title to the said land and premises and every part thereof, or against said complainant, and those deriving title under said complainant under the pretended selections listing letters patent and other proceedings set forth in the plaintiff's bill of complainant. And that the said defendants, John Mullan and Francis Avery, and each of them, and their and each of their agents and attorneys, servants, and grantees, be, and they hereby are, enjoined and restrained from selling, assigning, transferring, encumbering, or in any manner alienating any interest derived, or claimed to be derived, under said patent in or to said land and premises, or any part thereof, and from asserting any right, title, or interest therein, or in any part thereof, or in the rents, issues, and profits thereof as against said complainant and its grantors by virtue of any right or title founded in and upon said letters patent of the State of California or the various proceedings, or any of them, upon which said letters patent were or are based or issued.

And it is further ordered, adjudged, and decreed that the defendants pay to the complainant its costs in this suit taxed at two hundred seventy-four $\frac{50}{100}$ dollars.

March 29, 1882.

LORENZO SAWYER,
Circuit Judge.

60 Endorsed: Filed and entered March 27, 1882. L. S. B. Sawyer, clerk. Eq. Dec., reg. 2, p. 384.

61 UNITED STATES OF AMERICA:

Memorandum of Costs and Disbursements.

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

UNITED STATES, Plaintiff, *vs.* JOHN MULLAN *et als.*, Defendants.

Disbursements:

Copy field-notes	$5		
Marshal's fees	4		
Certified copy of plats	2		
Clerk's fees	78	60	
Examiner's fees	112	10	
Witness fees.			
John W. Bost, 156 miles, and one day	17	10	
Benj. Jones, 365 " " " "	38		Disal'd.
Asher Tyler & John A. Davis, 56 miles, & one day each	14	20	

George H. Thompson, one day	1	50
8 depositions	20	
Docket fee	20	
	$312	50
Dis'd	38	
Taxed at	$274	50

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
D'p'y Cl'k.

62 UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco, } *ss:*

Philip Teare, being duly sworn, deposes and says: That he is the attorney for the United States, plaintiff in the above-entitled cause, and as such is better informed relatiive to the above costs and disbursements than the said plaintiff.

That the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

PHILIP TEARE.

Subscribed and sworn to before me, this 3d day of March, A. D. 1882.

S. C. HOUGHTON,
Commissioner U. S. Circuit Court, &c.

Taxation affirmed, March 27, 1882.

To B. S. Brooks, Esq., attorney for defendants:

You will please take notice that on Monday, the 6th day of March, A. D. 1882, at the hour of 10.30 o'clock a. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

PHILIP TEARE,
Attorney for Plaintiff.

(Endorsed:) Service of a copy of the within memorandum
63 of costs and disbursements and notice of taxing same is hereby admitted this 4th day of March, A. D. 1882. B. S. Brooks, defendants' att'y. Filed this 4th day of March, A. D. 1882. L. S. B. Sawyer, clerk.

64 Whereupon said subpœna, pleadings, certified copy of order overruling demurrer, final decree, and memorandum of taxed costs are hereto annexed, and said decree is duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, &c.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Enrolled papers. Filed March 27th, 1882. L. S. B. Sawyer, clerk.

65 *Stipulation as to Sufficiency of Testimony in Short-hand.*

In the Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

UNITED STATES *vs.* JOHN MULLAN, FRANCIS AVERY.

It is stipulated and agreed between the parties to this suit, by their respective attorneys, that when the testimony of witnesses is taken down by the short-hand reporter it shall not be necessary that the testimony should be read over to the witness after being written out in long-hand, nor that it be subscribed by the witness; but the said testimony (all other requirements of the law and the rules of the court having been complied with) may be read upon the hearing with the same force and effect as if the same had been read over by the witness, corrected by him, and subscribed by him.

W. H. L. BARNES,
Of Counsel for Complainant.
B. S. BROOKS AND
JOHN MULLAN,
Sol's for Def'ts.

Endorsed: Filed 23 April, 1879. L. S. B. Sawyer, clerk.

66 *Stipulation as to Copies of Documents.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of California.

THE UNITED STATES OF AMERICA
vs.
JOHN MULLAN and FRANCIS AVERY.

Stipulation.

It is stipulated that the copies of documents hereto annexed are true copies of originals, and that they may be used upon the hearing of this cause without being put in evidence before the examiner, and with the same force and effect as the originals would be entitled to if produced, and subject to the same objections.

PHILIP TEARE,
United States Attorney.
B. S. BROOKS,
Sol. for Def'ts.

67 *Barnard's Application to Locate and Purchase.*

Grant of the 16th and 36th sections.

Application for location under the State.

Location No. 261. San Francisco land district.

SAN FRANCISCO, *May 13th*, 1865.

To State locating agent:

I, Frank Barnard, of San Francisco county, State of California, do hereby apply, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, to purchase and locate the following-described land in Contra Costa county:

The north half of section eight, township one north, range one east, of Mount Diablo meridian, containing three hundred and twenty acres, according to the returns of the U. S. surveyor general, and which I agree to accept in lieu of the full amount of 320 acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in the following manner, viz: Twenty per cent. of the purchase-money, together with interest on the balance at the rate of ten per cent. per annum, in advance, from the date of location in the locating agent's office.

This location has been made by me in lieu of E. ½ of sec. 16, T. 2 N., R. 8 W., Mount Diablo meridian, which is included in a private grant.

Affidavit of Location.

Location No. 261. San Francisco land district.

STATE OF CALIFORNIA, *County of San Francisco:*

I, Frank Barnard, of San Francisco county, State of California, being duly sworn, depose and say: That I am a citizen of the United States and a resident of the State of California, of lawful age;
68 that I am an applicant for the purchase and location of the above-described lands; that the same are unoccupied by any person other than myself, and that to the best of my knowledge and belief there is no valid claim existing upon the land so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

Witness my hand.

FRANK BARNARD.

Sworn and subscribed to before me, this 13th day of May, A. D. 1865.

[5c. stamp.]

LEANDER RANSOM,
State Locating Agent.

We, N. Van Bergen, James B. Peck, and Aaron Van Dam, of San

Francisco county, State of California, being duly sworn, each for himself deposes and says: That he is acquainted with the lands described in the above application and sought to be located by the above-named Frank Barnard; that there is no valid claim existing upon the land so described adverse to the claim above named, nor any improvements other than those owned by the said applicant, to the best of his knowledge and belief, and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by said Frank Barnard.

Witness our hands.

N. VAN BERGEN.
JAMES B. PECK.
AARON VAN DAM.

69 Sworn to and subscribed before me, this 13th day of May, A. D. 1865.

[15c. stamp.]

LEANDER RANSOM,
State Locating Agent.

I, Leander Ransom, state locating agent for the San Francisco land district, do hereby accept the above offer, under the following conditions: That if such location be made and approved by the United States it shall be for the use and benefit of the applicant, on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved April 27th, 1863.

LEANDER RANSOM,
Locating Agent.

Office of locating agent, San Francisco, May 15th, 1865.

Affidavit to Accompany Applications to Purchase State Lands, as Required by Act of Legislature, Passed April 27th, 1863.

I do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign; that I will bear true faith, allegiance, and loyalty to the said Constitution and Government, any ordinance or law of any State, convention, or legislature, or any rule or obligation of any society or association, or any decree or order from any source whatsoever, to the contrary notwithstanding, and that I will support the constitution of the State of California; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title
70 to, interest in, or possession of any land, in order that such title, interest, or possession may be transferred to any person or persons, to enable such person or persons to evade the provisions of any law of the State of California or any regulation of the General Land Office at Washington.

(Signed) FRANK BARNARD.

Subscribed and sworn to before me this thirteenth day of May, 1865.

[5c. stamp.]

(Signed) LEANDER RANSOM,
State Locating Agent.

Grant of the 16th and 36th Sections for School Purposes.

San Francisco Land District. Location No. 261.

STATE OF CALIFORNIA, LOCATING AGENT'S OFFICE.

I hereby certify that, in accordance with the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and with the instructions of the surveyor general, I have located, as a portion of the school lands, three hundred and twenty acres of public land in the county of Contra Costa, at the request and for the use of Frank Barnard.

Said land is described as follows: N. ½ of sec. 8, T. 1 N., R. 1 E., Mount Diablo meridian.

Taken in lieu of E. ½ of sec. 16, T. 2 N., R. 8 W., Mount Diablo meridian.

This location has been made by me, by filing an application for the same, in the name and for the benefit of the State of Cal-
71 ifornia, at the U.S. Land office for the San Francisco district, in the city of San Francisco, and with the consent of John F. Swift, register of said district, bearing date the 25th day of June, A. D. 1865, and the same is entered and numbered upon my register of locations.

Witness my hand at office in San Francisco, this 30th day of June, 1865.

LEANDER RANSOM,
State Locating Agent for the San Francisco Land District.

SURVEYOR GENERAL'S OFFICE,
SACRAMENTO, *the 11th day of August*, 1865.

The above location is hereby approved, and the treasurer of Contra Costa county shall receive in payment therefor, from Frank Barnard, one hundred and twelve (112) dollars, within fifty days from the record of the surveyor general's approval, being twenty per cent. of the purchase money, and one year's interest on the balance in advance, at the rate of ten per cent. per annum from the date of location in the locating agent's office.

[Seal of the Sur. Gen'l's Office.]

J. F. HOUGHTON,
Surveyor General.
By A. S. BENDER, *Deputy.*

72 Endorsement on Barnard's affidavit: (The following is endorsed on the "affidavit for location:") Affidavit and description of land to accompany the application of Frank Barnard. Contra Costa county. No. —, township 1 N., range 1 E., section 8,

N. ½. Containing 320 acres. Located May 13th, 1865. Surveyed ——, 1864. By U. S. Sur. Gen'l.

73 Endorsement on Barnard's application to locate and purchase: Grant of the 16th and 36th sections for school purposes, San Francisco land district, location 261, Mount Diablo meridian, Township No. 1 N., range No. 1 E., section 8 N. ½. Taken in lieu of E. ½ of sec. 16, in township No. 2 N., range No. 8 W., M't Diablo meridian, containing 320 acres, in lieu of 320 acres located for Frank Barnard, by Leander Ransom, locating agent. Rec'd and filed July 11th, 1865. Approved August 11th, 1865. J. F. Houghton, surveyor general, by A. S. Bender. deputy.

74 *List No.* 19.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 10*th January*, 1871.

I, Jos. S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of the original now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal of Gen'l Land Office.]

JOS. S. WILSON,
Commissioner of the General Land Office.

GENERAL LAND OFFICE, 28 *Dec.*, 1870.

The tracts described in the following list have been critically examined and are found to be free from conflict and to inure to the State for the purposes indicated.

B. F. REILEY.
J. J. BARNS.

75

Townships containing more than 17,280 acres, entitled to 1,280 acres.		Deficiency in school lands of township.			Selections to supply deficiency in school lands to which townships are entitled.					No. of application.	Date of selection.
Town.	Range.	Description.	Sec.	Area.	Descript.	Sec.	Town.	Range.	Area.		
2 N.	8 W.	E. ½	16	320	N. ½	8	11 N.	1 E.	320	261	May 13, 1865—1651

JNO. MULLAN.

76 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 28*th Dec.*, 1870.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of lands selected in the San Francisco district, State of California, as indem-

nity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of Mar. 3, 1853, Feb'y 26, 1859, and July 23, 1866.

It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the townships for which selected, are found to be subject to selection and free from conflict, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

JOS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR, *3d January*, 1871.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

C. DELANO, *Secretary.*

77 E. O. F. Hastings, San Francisco land district.

Indemnity list No. 19. 21,044.$\frac{25}{100}$ acres.

Rec'd & filed 24th Jan'y, 1871.

JOHN W. BOST,
Surv. Gen'l.
By DUNCAN BENNMONT.

Recorded Nov. 11, 1871, in vol. 1 of School Ind'ty Lists, pages 85 to 91, inclusive of the office records of the surveyor general of the State of California.

JOHN W. BOST,
Surveyor General.

SURVEYOR GENERAL'S OFFICE,
STATE OF CALIFORNIA.

I hereby certify that the annexed and foregoing is a copy of indemnity list No. 19 on file in my office; that said copy has
78 been compared by me with the original, and is a correct transcript therefrom, so far as the same relates to N. $\frac{1}{2}$ sec. 8, T. 1 N., R. 1 E.

In witness whereof I have hereunto set my hand and affixed my official seal this 26 day of May, A. D. 1880.

[SEAL.] JAMES W. SHANKLIN,
Surveyor General.

79 *U. S. Land Office Records.*

From the records of the United States land office in San Francisco, covering the two northern tiers of sections in township one (1) north, range one (1) east, shewing the disposition made of the first twelve (12) sections in said township.

Section one.

Northwest quarter. Western Pacific Railroad Company. April 3, 1872. List 8.

East half and southwest quarter. Western Pacific Railroad Company. May 31, 1870. List 5.

Section two.

North half. State selection. May 16, 1864. Approved April 2, 1870. [In pencil:] List 13.

South half. State selection. August 17, 1864. Approved July 1, 1870. List 15.

Section three.

Northeast quarter and north half of southeast quarter. Western Pacific railroad. May 31, 1870. List 5.

Northwest quarter. Western Pacific railroad. December 24, 1870. List 9.

South half of southeast quarter. Coal application of F. K. Shattuck. February 15, 1871. [In pencil:] Com. letter, M'ch 2, 1869.

North half of southeast quarter. Coal application. Cancelled.

Southeast quarter of southwest quarter. Coal application. Rejected.

Southwest quarter of southwest quarter. Coal application
80 of E. C. Clark. May 11, 1868.

Section four.

Northeast quarter. Military bounty warrant. Nicholas Smith. May 21, 1866.

Northwest quarter. [In pencil:] Lot 1 & 2. Military bounty warrant. William Prosser. October 8, 1872.

North half of southeast quarter. State selection. May 16, 1864. Approved July 1, 1871. List 22.

Southeast quarter of southeast quarter. Coal application. E. C. Clark. May 11, 1866.

Southwest quarter of southeast quarter. Coal application. H. S. Hawxhurst. June 16, 1866.

Southwest quarter. Coal application. S. B. Whipple. August 31, 1866.

Section five.

Northeast quarter. State selection. May 16, 1864. Approved November 15, 1871. List 23.

Northwest quarter. State selection. May 16, 1864. Approved July 1, 1871. List 22.

Southeast quarter. Western Pacific Railroad Company. May 24, 1872. List 9.

South half. State selection. May 19, 1864. (Seems to be still pending.)

Section six.

Northeast quarter of the northeast quarter and the south half of the northeast quarter. State selection. February 25, 1864. Approved July 1, 1871. List 22.

Northwest quarter of the northeast quarter. University of Cali-

fornia. October 5, 1872. Approved December 6, 1873.
81 List 3.

Northwest quarter (lots 1 & 2). Cash sale. James L. Lendrum. May 6, 1873.

Southeast quarter. School land warrant. May 16, 1864. Approved April 8, 1867.

Southwest quarter. 3 coal applications. Unsettled.

Section seven.

Northeast quarter. School land warrant. May 16, 1864. Approved April 8, 1867.

Northwest quarter. State selection. December 10, 1864. Declaratory statement. Henry Brown. April 4, 1865. And two coal applications, 4 and 11.

Southeast quarter. Western Pacific railroad. December 24, 1872. List 9.

Southwest quarter (lots 1 and 2). Declaratory statement. Robert Watson. August 1, 1870.

Section eight.

North half. [In pencil:] Com. letter. Apr. 11, 1872. State selection. May 13, 1865. Approved January 3, 1871. List 19.

Southeast quarter. Military bounty warrant. Peter Vestneys. January 28, 1873.

Southwest quarter. State selection. February 28, 1865. Approved January 30, 1868. List 2.

Section nine.

Northwest quarter of northeast quarter. Western Pacific Railroad Co. December 24, 1872. List 9.

Northeast quarter of northeast quarter. Coal application of E. C. Clark. May 11, 1866.
82 South half of northeast quarter. Western Pacific Railroad Co. December 24, 1872. List 9.

South half. Western Pacific Railroad Co. May 31, 1870. List 5.

Section ten.

North half of northeast quarter. Coal application of F. K. Shattuck. February 15, 1871.

South half of northeast quarter. State selection. May 15, 1864. Approved April 18, 1873. List 26.

Southeast quarter of northwest quarter. State selection. May 16, 1864. Approved April 18, 1873. List 26.

Northeast quarter of northwest quarter. Coal application. William Hillegas. July 28, 1868.

Northeast quarter of northwest quarter. Coal application. E. C. Clark. May 11, 1868.

Southwest quarter of northwest quarter. Military bounty warrant. Thomas Vivian. June 1, 1878.

North half of southeast quarter. Homestead. W. B. Stewart. March 17, 1873.

Southwest quarter. Agricultural College scrip. Jos. Harris. March 12, 1873.

Section eleven.

North half. School land warrant. May 16, 1864. Approved April 8, 1867.

Southeast quarter. Homestead. Patrick Corcoran. November 10, 1869.

Southwest quarter. State selection. May 16, 1864. Approved July 1, 1870. List 15.

Section twelve.

Northeast quarter. Declaratory statement. Martin Flynn.
83 October 24, 1870.

Southeast quarter. Declaratory statement. Patrick Griffin. January 25, 1870.

North half of northwest quarter. Southwest quarter of northwest quarter. School land warrant. Approved April 8, 1867.

West half of southwest quarter. East half of southwest quarter. Southeast quarter of northwest quarter. School land warrant. May 16, 1864. Approved October 17, 1861. List 22.

84 *State Patent to F. Avery.*

"Copy."

UNITED STATES OF AMERICA, *State of California:*

To all to whom these presents shall come, Greeting.

Whereas under the provisions of the several acts of the Congress of the United States, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September fourth, eighteen hundred and forty-one, five hundred thousand acres of the public lands were granted to the State of California; and an act entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, eighteen hundred and fifty-three, ten sections of land were granted for the erection of public buildings, and seventy-two sections for a seminary of learning, also the sixteenth and thirty-sixth sections of each township in said State; also, an act entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, one hundred and fifty thousand acres of the public lands were also granted to the said States; and whereas the Legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time; and whereas it appears by the certificate of the register of the State land office, No. 609, issued in accordance with the provisions of law, bearing date the sixth day of April, A. D., 1871, that the tracts of 16th & 36th section grant land, hereinafter described, have been duly and properly located in accordance with law, and that Francis Avery is entitled to receive a patent therefor:

Now, therefore, the State of California hereby grants to the said Francis Avery, and to his heirs and assigns forever, the said tracts of land, located as aforesaid, and which are known and described as follows, to wit: The north half of section eight (8), township one (1) north, range one (1) east, of Mount Diablo meridian, containing three hundred & twenty acres, taken in lieu of three hundred & twenty acres, together with all the privileges and appurtenances thereunto appertaining and belonging, to have and to hold the afore-granted premises to the said Francis Avery, and to his heirs and assigns, to his and their use and behoof forever.

85 In testimony whereof I, H. H. Haight, Governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed. Given under my hand, at the city of Sacramento, this the sixth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

[Seal of the State of California.]

H. H. HAIGHT,
Governor of State.

Attest: H. L. NICHOLS,
Secretary of State.

Countersigned:
[Seal of the State Land Office of California.]
J. W. BOST,
Register of State Land Office.
Per E. TWITCHELL, *Deputy.*

Endorsement on State patent: Letters patent from the State of California. Issued April 6th, 1871, to Francis Avery for 320 acres of 16th & 36th section grant school land, lying in Contra Costa county.

86 *Com'r of the G. L. O. to Gov'r of Cal'a.*

C. M N. J. J. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 6th*, 1871.

His Excellency the Governor of California, Sacramento, Cal.

SIR: In list No. 19 of California school indemnity selections, approved Jan'y 3, 1871, there was inadverdently included the following tract, viz: N. ½ sec. 8, t'p 1 N., R. 1 E., selected June 25, 1865, as indemnity for the E. ½ sec. 16, t'p 2 N., R. 8 W., R. & R., No. 345.

That the said tract was variously certified to the State is clearly shewn by our records, from an examination of which it appears—

1st. That the said N. ½ of 8, 1 N., 1 E., was at the date of said selection double minimum land, the odd sections of the township 1 N., 1 E., having been withdrawn for the C. P. R. R. Jan'y 30, 1865, nearly six month prior to the date of State selection.

2d. That the State had prior to the date of the approval of the

said N. ½ of sec. 8, 1 N., 1 E., selected other lands as indemnity for the said E. ½ 16, 2 N., 8 W., thereby acknowledging the invalidity of the first selection, viz:

N. ½ of N. E. ¼ and N. ½ of N. W. ¼ sec. 10, t'p 26 S., R. 13 E., selected Oct. 2nd, 1869, in lieu of the N. E. ¼ sec. 16, 2 N., 8 W., R. & R., No. 2378, and W. ½ of S. E. ¼ sec. 4 and N. W. of N. E. and N. E. of N. W. sec. 9, t'p 26 S., R. 12 E., selected Dec. 31, 1869, in lieu of the S. E. ¼ sec. 16, 2 N., 8 W., R. & R., No. 2459.

The first of the above selections was approved to the State Aug. 10, 1870, six months prior to the date of the approval of the said N. ½ 8, 1 N. 1 E.

3rd. That the said N. ½ 8, 1 N., 1 E., was coal land, so noted on the plats of survey on file in this office, and therefore was not subject to selection by the State, having been reserved by the act under which the said selections are made.

87 The certifying of the said N. ½ 8, 1 N. 1 E., was therefore, in view of the above facts, clearly an error, and in order that this error may be corrected, and as the said tract was approved, subject to any valid interfering rights which may have existed at the date of selection, I have the honor to request that you will on the part of the State of California relinquish to the U. S. the said N. ½ of sec. 8, t'p 1 N., R. 1 E., and, if a patent has been issued by the State, that the same be recalled and revoked, that the tract may be restored to the body of the public lands, and the rights of all parties protected.

I am, sir, very respectfully, your ob'd't serv't,

WILLIS DRUMMOND, *Commisioner.*

Governor's Reply.

SACRAMENTO, *Sept.* 20, 1871.

Hon. Willis Drummond, Commissioner.

SIR:- Your letter "C," dated Sept. 6, 1871, regarding relinquishment of certain land by the State of California, was duly received.

The question of the power of this State under the laws thereof to make such relinquishment has been under consideration by myself and the attorney general, and the conclusion arrived at is that no such power exists.

The Department will therefore take such action as the Commissioner may deem proper.

Very respectfully your ob'd't serv't,

H. H. HAIGHT, *Governor.*

88 *Com's'r of the G. L. O. to the Gov'r of Cala.*

J. J. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 14th*, 1872.

His Excellency the Governor of California, Sacramento, Cal.

SIR: Referring to our letter of Sept. 6, 1871, to your predecessor

in office, requesting him to relinquish the N.½ sec. 8, T. 1 N., 1 E., supposed to have been erroneously certified to the State in list No. 19 of school indemnity selections, approved Jan'y 3, 1871, I have now to state that from a further examination of the case it is found that the allegation of facts as set forth in that letter were erroneous, and that there now appears to be no valid grounds for interfence on the part of this office in the case. I have, therefore, to request that you will return the letter above referred to to this office, as the request therein contained is hereby withdrawn, and all action by this office as against the title of the claimant under the State subsequent to the certification of the tract is hereby rescinded.

I have the honor to be, very respectfully, your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

Com's'r of the G. L. O. to F. Avery.

C. M. M. J. J. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 14th*, 1872.

Francis Avery, Esq'r, San Francisco, California.

89 SIR: Referring to your communication of Dec. 23, 1871, filed in this office by Messrs. Britton & Gray, in relation to the N. ½ sec. 8, T. 1 N., R. 1 E., approved to the State of California Jan'y 3, 1871, in list No. 19, I herewith enclose a copy of our letter addressed to the Governor of the State, which will explain the action of this office in the premises.

Very respectfully, &c.,

WILLIS DRUMMOND,
Commissioner.

Com's'r of the G. L. O. to Britton & Gray.

C. J. J. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 14th*, 1872.

Britton & Gray, Washington, D. C.

GENTLEMEN: Referring to your letter of Jan'y 23d ulto., enclosing sundry arguments by Francis Avery relative to the N. ½ sec. 8, T. 1 N., R. 1 E., approved to the State of California Jan'y 3, 1871, in list No. 19, I have to inform you that I have this day requested the Governor of California to return our letter of Sept. 6, 1871, asking him to relinquish the above-named tract, and have ordered the case to be finally dismissed from our docket. I have advised Mr. Avery of the above action per letter of this date.

Very respectfully, &c.,

WILLIS DRUMMOND,
Commissioner.

90 (Endorsed:) Stipulation & copies of documentary evidence. Filed July 9, 1880. L. S. B. Sawyer, clerk.

U. S. Circuit Court, District of California.

THE UNITED STATES } 1939.
vs.
JOHN MULLAN *et al.* }

Depositions of witnesses for complainants.

Bost.
Jones.
Thompson.
Tyler.
Davis.

For respondents.

Avery.
Barnard.
Teare.

91 In the Circuit Court of the United States for the District of California.

THE UNITED STATES *vs.* JOHN MULLAN *et al.*

Be it remembered that on the 3rd day of March, A. D. 1879, at the office of W. H. L. Barnes, Esquire, in the city and county of San Francisco, State of California, before me, J. F. O'Beirne, an examiner in chancery, duly appointed by the circuit court of the United States for the ninth judicial circuit, district of California, personally appeared the persons whose names hereinafter appear, witnesses on behalf of the complainant and respondents in the above-entitled action.

W. H. L. Barnes, Esquire, appeared as counsel on behalf of the said complainant, and B. S. Brooks, Esquire, appeared as counsel on behalf of the said defendants.

And the said witnesses, having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as follows—that is to say:

Depositions—J. W. Bost.

Examination-in-chief of JOHN W. BOST by Mr. BARNES:

Q. 1. State your name, age, residence, and occupation.

A. My name is John W. Bost; I am forty-five years of age; I reside in Merced county, California, and I am by occupation a surveyor.

Q. 2. How long have you resided in the State of California?

A. Twenty-nine years.

92 Q. 3. What office, if any, did you hold in the State of California in the year 1868?

A. I was surveyor general of the State, *ex officio* register of the State land office.

Q. 4. For the purpose of fixing the date I call your attention to the following application for location under the State, as follows:

"Location number 1651, land district, San Francisco, August 23d,

1868. To John W. Bost, surveyor general: I, John Mullan, of San Francisco county, State of California, do hereby apply, under the provisions of an act entitled 'An act to provide for the management and sale of the lands belonging to the State,' approved March 28th, 1868, to purchase and locate the following-described land in Contra Costa county: north half of section 8 (eight), in township No. 1 north, range No. 1 east, Mount Diablo meridian, containing 320 acres, according to the returns of the U. S. surveyor general, and which I agree to accept in lieu of the full amount of E. ½ of sec. 16, t'p 2 N., R. 8 W., containing 320 acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in gold or silver coin of the United States, in the following manner, viz.: twenty per cent. of the purchase-money, together with interest on the balance, at the rate of ten per cent. per annum, in advance, from the date of approval of the location in the surveyor general's office. This location has been made by me in lieu of E. ½ of sec. 16, t'p 2 N., R. 8 W., Mount Diablo meridian. (Signed) John Mullan." Also, for the same purpose to an affidavit for location, as follows: "State of California, city and county of San Francisco. Location No. 1651, land district. I, John Mullan, of San Francisco county, State of California, being duly sworn, depose and say: That I am a citizen of the United States, and a resident of the State of California, of lawful age; that said township has been sectionized and subject to pre-emption since 1864; that said occupants (names unknown), if any, have been in occupation for more than sixty days, and said lands now belong to the State. Witness my hand. John Mullan. Subscribed and sworn to before me this 24th day of August, A. D. 1868. Sam. Hermann, notary public." Also, to the following: "I, John W. Bost, surveyor general of the State of California, do hereby accept the above offer under the following conditions: That if such location be made and approved by the United States it shall be for the use and benefit of the applicant on his complying with
93 all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved March 28th, 1868. (Signed) John W. Bost, surveyor general. Surveyor general's office, 25th August, 1868."

Obj. Mr. BROOKS: I object to that. Mr. Barnes is reading from the transcript on appeal in the supreme court, and I object to the reading of the transcript to the witness. I am not aware that is not admissible for any purpose to do so.

Mr. BARNES: The reading is simply to call the attention of the witnesses to dates and persons, and not for the purpose of proving either the application, affidavit, or certificate.

Q. 5. Do you know John Mullan, named in the application and affidavit just read?

A. Yes, sir.

Q. 6. How long had you known him prior to the twenty-fifth day of August, 1868?

A. Well, I knew him about a year before that, I think; I first became acquainted with him a year before.

Q. 7. What, if you know, was his business er occupation?

A. I don't know what it was at that time, unless it was real estate agent, land agent, land attorney—something of that kind.

Q. 8. At the date appended to the acceptance, a copy of which has just been read, to wit, on or about the twenty-fifth day of August, 1868, did you have any conversation with the said John Mullan in reference to his application for location of the north half of section 8, township 1 north, range 1 east, Mount Diablo meridian, containing three hundred and twenty acres, according to the return of the United States surveyor genéral, and which he agreed to accept in lieu of the full amount of the east half of section sixteen, township 2 north, range 8 west, containing three hundred and twenty acres? If so, state such conversation fully and at length, what he said, and what you said.

Obj. Mr. BROOKS: I object to all of that except the question.

A. At the time that this location was made I called Captain Mullan's attention to the fact of its being in the neighborhood of the Mount Diablo coal mine, and told him that I didn't like to accept it or approve it; I thought it was coal land, and I did not like to accept the location. It has been a long time ago, and I don't remember the exact language, but that is the substance of what was said.

94 I knew where those coal lands were, and I knew that this land was in that immediate neighborhood, and it was spoken of in the office. I spoke of it myself; told him at the time that he made the application for this land. I recollect the time that he made it and all about it. I can't remember the dates, except as you have mentioned them, except the year. That is about the substance of the conversation—my calling his attention to the fact that it was in the neighborhood of this coal mine.

Q. 9. Mr. BARNES: What did he say, if anything, in reply?

A. He replied that he had the United States register's acceptance, and, in substance, that it was my duty to approve it anyway, even if I did know that it was any of the coal lands; that it was my duty to accept and approve it; that it was State lands, and the register, Mr. Swift, had accepted the State application for it. The State had made application for it in 1865, I think, or at least before this time, and he said that the register had accepted it, and that it was my duty to accept it and approve it, and I did so.

Q. 10. Did he say anything further in relation to your duty in the premises or his power?

A. Well, I think he said he could compel me to approve it; that it had been accepted by the register, and that I had no other course to pursue but to accept and approve it.

Obj. Mr. BROOKS: I will save an objection that this testimony is a statement of the opinions of Mullan on questions of law, and not the facts.

Q. 11. Mr. BARNES: What, if anything, did he say, in reply to so much of your statement as referred to this land as being within the coal region?

A. My recollection is that Captain Mullan said it was State land, and that the State had no reserved lands and no school lands—they had reserved some tide lands around this bay, but they had no reserved school lands, and that it was my duty to approve it, and that if I didn't, he could compel me to do it by mandamus, or something of that kind.

Q. 12. What knowledge, if any, had you at that time as to
95 the situation or character of this north half of section 8, township 1 north, range 1 east, Mount Diablo meridian?

A. I didn't know to a certainty that there were any coal lands or any improvements on that part of it. I knew from my general knowledge of the country, as I had been over it several times, that it was in that vicinity.

Q. 13. Had you at that time seen the plats of the public surveys of this land made by the United States surveyor?

A. I think there was a copy of the plat in the office at the time, though I can't be positive about that. I think the copy, though, was there from the surveyor general's office here certified copy.

Q. 14. Do you remember whether or not the plat of that survey or of those surveys shewed the existence of coal mining operations on this land?

Obj. (Objected to on the ground that the plat is the best evidence.)

A. It strikes me now that it shewed that there was some mining shafts on it, but I don't remember so well about its mentioning coal or the names of parties; it has been so long that I don't recollect about that. The township plat certainly did, but about this section I don't know so well—this half section that you speak of.

Q. 15. Look at this plat of township 1 north, range 1 east, Mount Diablo meridian, now produced and shewn to you, exhibiting so much of said plat as refers to sections 5 and 8 of said township, and state whether or not the same corresponds with your recollection of so much of said plat as relates to this section.

Obj. Mr. BROOKS: I object that this paper produced does not purport to be a copy of the plat of said township; and the plat thereof on file in the office of the surveyor general is the better evidence.

A. (After examination.) Yes; it looks like a copy of the plat in the State surveyor general's office. Those dots representing shafts or something of that kind were there.

96 Ex. "A."

(The copy of plat above referred to is put in evidence by Mr Barnes and marked Complainant's "Exhibit A.")

Q. 16. Mr. BARNES: I now call your attention to the affidavit for location No. 1651, to the words: "I have not entered any portion of any sixteenth or thirty-sixth section which, together with that now sought to be purchased, shall exceed three hundred and twenty acres; that there is no occupation of said land adverse to that I now

hold." Do you know how, if at all, those words came to be stricken out of the form of the application and the following words inserted in lieu thereof: "Said township has been sectioned and subject to pre-emption since 1864; that said occupants (names unknown), if any, have been in occupation for more than sixty days, and said lands now belong to the State?" State all you know about that erasure and interlineation.

A. Do you want to know why that was stricken out?

Q. 16. All you know about it.

A. Well, I know those words were stricken out in the original application, because these were old blanks used by Col. Ransom when he was State locating agent. This land was taken up under the law of 1868, and the same oath on taking thirteenth and thirty-sixth sections was not required by law to be taken. That is the reason, as near as I can get at it, why it was stricken out. Those words that were erased here I think were erased in the original. It was merely changed to save the trouble of writing the oath necessary.

Q. 17. By whom was the erasure and interlineation made, if you know?

A. My impression is that it was done by Captain Mullan. He wrote his own applications generally.

Q. 18. At the time of the filing of that affidavit with you was there anything said with reference to the occupation of the land?

A. I don't recollect that there was anything said about the occupation. I think it probable I asked him whether it was occupied or not.

97 Q. 19. What did he say?

A. My recollection is he said it didn't make any difference whether it was or not. I don't think he had ever been on the land himself. I think he said he had never been, but that it didn't make any difference whether it was occupied or not; that is my recollection about it.

Q. 20. At the time of your reception of this affidavit, dated the 25th of August, 1868, and at the time of your acceptance of the same, were you or not aware of the character of those lands?

A. I believed them to be coal lands. They were so close to that mining region that I believed them to be coal lands, though I wasn't on it then, and I haven't been on it since. I didn't know it to be coal land, though I believed it to be.

Q. 21. When you mentioned your belief to Mullan that these lands were coal lands, or in the neighborhood of coal lands, did he make any reply to that part of your remarks?

A. The same that he did before—that it was State land, had been accepted by the register, and that State officers had nothing to do with determining the question as to whether or not they were reserved.

Q. 22. I call your attention now to the following document:

"STATE OF CALIFORNIA,
"OFFICE OF THE SURVEYOR GENERAL,
"SACRAMENTO, *27th April*, 1869.

"Location No. 1651.

"I hereby certify that in accordance with the provisions of an act entitled 'An act to provide for the management and sale of the lands belonging to the State,' approved March 28th, 1868, I have located as a portion of the school lands 320 acres of public lands in the county of Contra Costa at the request and for the use of John Mullan. Said land is described as follows: N. ½ of sec. 8, T. 1 N., R. 1 E., Mount Diablo meridian. Taken in lieu of E. ½ of sec. 16, T. 2 N., R. 8 W., Mount Diablo meridian.

"This location has been made by me in the name and for the benefit of the State of California at the U. S. land office for
98 the San Francisco district, in the city of San Francisco, and with the consent of John F. Swift, register of said district, bearing date the 28th day of May, A. D. 1865, and the same is entered and numbered upon my register of locations. The said location is hereby approved, and the treasurer of Contra Costa county shall receive in payment therefor from John Mullan one hundred and one $\frac{65}{100}$ (101.65) dollars within fifty days from the date of the surveyor general's approval, being twenty per cent. of the purchase money, and interest on the balance in advance, at the rate of ten per cent. per annum from the date of the approval of the location in the surveyor general's office.

"JOHN W. BOST, *Surveyor General.*

"(Endorsed:) Certificate issued. Patent issued. Grant of the 13th and 36th sections for school purposes. San Francisco land district. Location No. 1651. Mt. Diablo meridian. Township No. 1 north, range No. 1 east. Section 8. Taken in lieu of E. ½ of section 16, in township No. 2 north, range No. 8 west, Diablo meridian, containing 320 acres, in lieu of 320 acres, located for John Mullan. Rec'd and filed 25th August, 1868. Approved 27th April, 1869. John W. Bost, surveyor general."

At the time of making that certificate what, if anything, did you know of the situation and condition of these lands—with reference to their being coal lands or not.

A. I didn't know anything more than I have stated.

Q. 23. What was that that you knew?

A. You have got my answer. I didn't know any more than I have stated as to the character of the land—that I believed it to be coal land from the fact that it was right there in the immediate vicinity of the coal mines.

99 Cross-examination by Mr. BROOKS:

Q. 1. Mr. Bost, I wish the fact to appear that no original document has been shown you; I therefore ask you whether the documents that have been read to you in this examination have not been read from a printed transcript on appeal?

A. Yes, sir.

Q. 2. Do you remember the transactions aside from what you learned from these copies here?

A. Yes, sir; I rememebr the time, and what I have stated here I remember all about.

Q. 3. You remember the fact?

A. I remember the fact of these conversations that took place at the time.

Q. 4. And approximately the dates?

A. Yes, sir; about the dates.

Q. 4. You recollect that at the time this application was made to you by John Mullan, he did not apply to you to locate the land, do you not?

A. I recollect that he did apply to locate it.

Q. 5. Did he not tell you that it had already been located by the State in 1865?

A. Oh, he didn't ask me to apply to the register to locate it; he applied to me for the land.

Q. 6. That is, he applied to you to purchase the land from the State—not to locate it?

A. No, sir; my impression is that the register's acceptance was already in the office.

Q. 7. You understood that?

A. Yes, sir.

Q. 8. The blanks that were used on this occasion were old blanks that had been long in the office, were they not?

A. Yes, sir; before my time.

100 Q. 8. You had no blanks prepared in accordance with the law under which you were then acting for this purpose?

A. No, sir; at any rate an old blank was used on this occasion.

Q. 9. Why did you state here in your certificate:

"This location has been made by me in the name and for the benefit of the State of California, at the U. S. land office, for the San Francisco district, in the city of San Francisco, and with the consent of John F. Swift, register of said district, bearing date the 28th day of May, A. D. 1865."

A. That was the form they were using at the time I went into the office, and I made no changes.

Q. 10. You did that because the printed form read so?

A. Yes, sir.

Q. 11. It was not a fact that you made the application, was it? You were not the land register at that date?

A. No; I didn't make the application, but I think it was done by consent.

Q. 12. The certificate says: "This location has been made by me." You did not do that?

A. No; I did not; Colonel Ransom did.

Q. 13. Was not that all in the printed form?

A. That was in the printed form; yes, sir.

Q. 14. The portion that I am referring to in there was dated the 28th day of May, A. D. 1865?

A. The date of the segregation; yes, sir.

Q. 15. This part that I am reading now, that was written there, was the date of the application, the 28th of May, 1865?

A. Yes, sir.

Q. 16. And that was before your time, before you held that office, was it not?

A. Yes, sir; I didn't hold it in 1865.

Q. 17. John F. Swift was not register at the time you were surveyor general, was he?

A. I don't recollect whether he was or not; I don't think he was; I think Mr. Shanklin was; but he was register when that application was made; it was done by the State authority; the application was by the locating agent.

101 Q. 18. And the fact was that the application and acceptance were with the consent of John F. Swift, register of said district, bearing date the 28th day of May, 1865, and the same was entered and numbered upon your register of locations—that is, on the register of locations in your office at that time?

A. Yes, sir; I don't know that there was any entry of the location made upon the book, but his acceptance was in the office.

Q. 19. Wasn't that entered and numbered on your register of locations?

A. I presume it was; yes, sir.

Q. 20. There was such a register in that office, was there not?

A. I think so; yes, sir.

Q. 21. Don't you know?

A. These certificates were very often just filed. When an approval was made they were not entered in the book. They had a certificate from the register, and they were just filed in the office with the application.

Q. 22. Was there no approval before this of yours?

A. I think there was.

Q. 23. Does not the approval of the surveyor general precede the consent of the register of the United States land office, as a rule?

A. Under the law of 1868 it was made my duty to apply to the register for these State applicants, but under the old law, when Ransom was locating agent, I think that he applied first to the register, and sent the acceptance, with the application, to the office; I think that was the way; but very often there were acceptances there for land, before I went there at all, that had been abandoned or had been forfeited, no payments having been made, and those certificates were as good for the second as for the first, so far as the State was concerned. That acceptance was dated in 1865, and when I found it there in 1868 it was just as good as if I made it myself. I so regarded it.

Q. 24. When this location was made there was an officer known as the State locating agent, was there not?

A. Yes, sir.

102 Q. 25. And that office was held by Leander Ransom?

A. Yes, sir.

Q. 26. At the time that you were acting as surveyor general there was no such officer, was there? The office had been abolished?

A. Yes, sir; they were abolished about six months after I went into office. The first Legislature after abolished them.

Q. 27. At the date of this certificate had that office been abolished?

A. That was taken up under the law of 1868, I think; I know it was.

Q. 28. The office of State locating agent had been abolished at that time?

A. Yes, sir; I think it had been abolished.

Q. 29. Why did you say "the State location is hereby approved?" Was that required under the law under which you were acting, or was that a part of the old system?

A. That was on the old blanks.

Q. 30. It was not required under the law under which you were acting, was it?

A. I think so; yes, sir; just read it, if you please.

Q. 31. (Reads:) "Said location is hereby approved, and the treasurer of Contra Costa county shall receive in payment therefor"——

A. (Interrupting.) Yes, sir; I know they were all written the same way afterwards; that is, the approval of the location after it had stood in the office a certain length of time. Sixty days, I think, was the time required by law.

Q. 32. Under the new law was not the location or selection made by the purchaser himself, and then did you not add to that "the above location is hereby approved?"

A. Yes, sir.

Q. 33. That was the law?

A. That is there.

Q. 34. But that is part of a long certificate?

A. Perhaps that is the certificate I signed to cover—no, that is the approval authorizing the treasurer of the county to receive the money for these locations. The application is made on one-half of these blanks, and on the other half is my approval—that certificate
103 that you see there; that is the approval of the location, and authorizes the treasurer of the county to receive the money from the applicant, and unless it is paid within fifty days—and I think it says so there, don't it—or unless it is paid within a certain time, the location is void.

Q. 35. In your acceptance of the offer, you say that this is accepted, "under the following conditions; that if such location be made and approved by the United States, it shall be for the use and benefit of the applicant." The selection had already been approved, had it not?

A. It had been approved by the register, on the part of the Government.

Q. 36. What did you refer to in that, or did you simply sign it because it was printed in there?

A. Yes, sir; that was made when it was very uncertain about these lieu lands. The State didn't want to assume any responsibility; that was what it was put there for; to avoid any responsibility on the part of the State.

Q. 37. That referred, then, to the subsequent action of the officers of the Government, did it?

A. Yes, sir.

Q. 38. Not to the consent of the register?

A. No. Supposing that it had never been listed. That application was made before it was listed, and approved before it was listed, and, I think, patented, probably.

Q. 39. You knew of the Black Diamond coal mines, did you not?

A. Yes, sir; I knew where they were.

Q. 40. Generally?

A. Yes, sir; generally, their geographical position.

Q. 41. And you knew the fact that the Black Diamond coal mines were worked?

A. I knew that they were working coal mines in that vicinity.

Q. 42. That coal had been taken out from there and sold in the market?

A. Yes, sir.

Q. 43. Were traced copies, or copies of the township maps,
104 certified to you from the United States Land Office?

A. From the United States Surveyor General's office; yes, sir. Sometimes they were certified, and sometimes they were not. They were not all certified to, I think; they generally were though.

Q. 44. You had copies of them all, had you not?

A. Yes, sir; I think I did.

Q. 45. Wherever you acted?

A. Well, not always, but generally. There was a small amount alway- appropriated for the purpose of getting plats or copies, and if it was actually necessary we would always get them, and if it was not, it was not compulsory at all; we could do as we pleased about it.

Q. 46. Was it not always necessary for you to have a copy of the plat when you acted upon an application?

A. No, sir; the law don't require anything of the sort, or didn't. That was for convenience more than anything else. I don't think there is anything in the law about it.

Q. 47. As a matter of fact, did you act upon applications for land without having a copy of the plat before you?

A. I think I have, without having the official plat; yes, sir.

Q. 48. Or any copy of it?

A. If the register's certificate was perfect, his acceptance, the State's application was accepted; as a matter of course, I knew it had been surveyed and approved, and all that.

Q. 49. That was the fact in this case, was it not?

A. I am not certain about that. My impression is that the plat was there, but I am not sure.

Q. 50. I mean that in this case the register's consent had been obtained?

A. Yes, sir; I knew by that that it had been surveyed.

Q. 51. But you say that this tracing of the map, which has
105 been produced here, appears to you to be a copy of a map that was in the office?

A. It looks like it.

Q. 52. Then there must have been a copy of the map of this township in the office?

A. Yes, sir.

Q. 53. Do you remember it?

A. Yes, sir; I think there was one there when I made the approval. I have seen the plat.

Q. 54. Do you remember this: that the plat of that township does not show a complete township; that is to say, a portion of it is unsurveyed?

A. Yes, sir; in the Chapparal hills. I suppose they could not do it. The southern portion of the township I don't think is surveyed. It is a fractional subdivision.

Q. 55. Have you any recollection as to who prepared this affidavit?

A. I think Captain Mullan filled it out himself. He always did fill out his blanks. He made a great many applications—acted as attorney for others. I think it will be found that it is in his handwriting.

Q. 56. He told you, did he, that he had never been on the land?

A. I think he said that he had never seen it. He had his information about it from some one else.

Q. 57. And did not know whether it was occupied or not?

A. I am not sure about that. I think he said it didn't make any difference whether it was or not. I think that was his answer to me.

Q. 58. You don't remember whether he said that he didn't know; that he had never been on the land, and didn't know whether it had been occupied or not, and it didn't make any difference?

A. That was his answer; that it didn't make any difference whether it was or not.

106 FRIDAY, *April* 18, 1879.

Present: Mr. Barnes, of counsel for complainant; Mr. Brooks, of counsel for defendant.

Depositions—Benj. Jones.

Examination-in-chief of BENJAMIN JONES, by Mr. BARNES:

Q. State your name, age, residence, and occupati on.

A. My name is Benjamin Jones; my age is fort*y*-eight; my residence is San Francisco at present, and my occupation coal miner.

Q. 2. How long have you been in the business of coal mining?

A. About twenty-five years.

Q. 3. Where?

A. First in Wales, secondly in Ohio, and Mount Diablo, Contra Cota county, and Coos Bay, Oregon.

Q. 4. Do you know the north half of section 8, township 1 north, range 1 east, Mount Diablo meridian?

A. Yes, sir.

Q. 5. When was it first brought to your notice?

A. In the spring of 1861—March, I think, 1861.

Q. 6. In what way did you come to know anything about it?

A. I went there to look after work as a coal miner.

Q. 7. What did you find there?

A. I found that they had run two tunnels in there previous to that.

Q. 8. Do you remember their length and situation at that time, in 1861?

A. One of them, what we called the old Cumberland tunnel, was run in on the coal, and what we call the Upper Black Diamond was run through a sand rock, through the stratification, about
107 three hundred foot across the stratas, and tapped the vein.

Q. 9. What business was being carried on there at the time you went there, in 1861?

A. Coal mining, sir, and shipping coal, even at that time.

Q. 10. What erections for the purpose of carrying on this business of coal mining were there on the premises at that time?

A. There was probably about sixteen miners working there when I went there.

Q. 11. Any buildings?

A. A hotel there, and an office, and sleeping houses for the men that was boarding.

Q. 12. What was the occupation of the men who lived at the hotel; what were they doing for a living?

A. Coal mining on this half section of land entirely.

Q. 13. What erections for the deposit of coal were there outside the mine put there about that time, 1861 or 1862?

A. They built the coal bunkers in the fall of 1861, two of them. They used to throw the coal out on the open platform before they shovelled it out to the wagons, and in the fall of 1861 they built the bunkers there, so we dumped the coal into the bunkers and loaded the wagons from the bottom—from the chutes—to save breakages, and a cheaper way of handling it.

Q. 14. How was the coal taken away from there?

A. In wagons.

Q. 15. To what place did the wagons haul it?

A. It was hauled down to New York landing, about six miles from there, at the junction of the San Joaquin and Sacramento—near about there.

Q. 16. What conveniences were arranged for the wagons coming down to the landing?

A. The company had to build roads there to get down to the plains, and after striking the New York grant there was tolerable level roads, but it cost a good deal to build them, to go down through the cañons, to reach down, build bridges, &c.

108 Q. 17. In 1861 were there any, and, if so, what, conveniences for shipping the coal at New York landing?

A. There was a shed and a small wharf built there—that is, I don't know that the shed was built in 1861, either. They had a large platform of two-inch planks, nailed down, there, so that the teams

would empty the coal right on that platform, and then they used to load it into the vessels from that.

Q. 18. And where did the vessels transport it to?

A. To San Francisco, sir. Doc. Ramsdell was the agent at that time, and he was a partner as well in the mine. He is dead now—died many years ago.

Q. 19. Was there ever any incline built at that mine? If so, describe it, and state when it was built and what it cost.

A. The incline was built there, I think, in 1865. I am not positive as to the year.

Q. 20. What was it?

A. It was quite an expensive piece of work—trestle work—built up from the bottom of the hill up to the top, and the full cars going down would pull the empty ones up. That done away with the hauling down hill.

Q. 21. What was, approximately, the cost of that incline, if you know?

A. The cost of the incline must be about fifteen thousand dollars above the line there of this half section. It cost, I believe, about twenty-five thousand altogether—from that to thirty; but there was a portion of it below the line.

Q. 22. Besides the mining that was being carried on on the north half of section 8, do you recollect whether or not that stratum of coal extended beyond that section or outside of it; if so, in what direction did it extend and what mines, if any, were being opened and worked there?

A. It extended both east and west. It went east over to Summersville, about a mile from there, and another little cañon. They were prospecting there in 1861 also, and they have worked in Summersville ever since on the same strata.

Q. 23. Had those mines or workings then any known designation?

A. Yes, sir.

109 Q. 24. What were they called?

A. The Manhattan Coal Mining Company, the Union Coal Mining Company, of which Whipple, I believe, was the owner, and the Eureka, and the Pittsburg Mining Company, and the Independence.

Q. 25. Were all these mines on the same extension of the same stratum of coal?

A. On the one of these stratas that was on this section 8; yes, sir. The Black Diamond vein didn't prove as well there in Summersville as it did this side, but what we call the Clark vein continued right through, and they worked in Summersville on that vein altogether, except the Manhattan mine.

Q. 26. You speak of these deposits of coal and the strata of coal there. Were they perceptible on the surface? Did they come to the surface, or did you have to go below for them?

A. No, sir. You could see them cropping out between the stratas of sand rock quite bold on the surface. It was about the easiest place to prospect I ever see for coal.

Q. 27. Could or not the ledge or stratum be traced on the surface?

A. Yes, sir.

Q. 28. You say you went there for the purpose of getting work. Did you get any?

A. Well, yes, sir. I went there for the purpose of getting work by the day, but they were not having very good success with the men they had there. A great many of the men then didn't know how to mine, and it was very hard to get a man to know how to work the mine, and the company proposed to me and three others that they would let us contract to run the mine—take the coal out by the ton.

Q. 29. Did you take out any under that contract?

A. Yes, sir; we took out all we agreed to under the contract.

Q. 30. How much?

A. Five hundred ton the contract called for.

Q. 31. How long were you at work doing that?

A. About six weeks, I suppose; something like that.

110 Q. 32. Then what did you do?

A. They let proposals out then to take the coal out, and a party here in the city by the name of Fuller and Northrup, they bid under us twenty-five cents, and they got the contract.

Q. 33. Then what did you do?

A. Then they tried to work it for about a month or six weeks. They had trouble with their men, and they came back after me, and asked me if I wouldn't take charge of it again, and I did agree, and went back and took charge of it for Northrup and Fuller until their contract run out, for a year.

Q. 34. In what year were you working under the Fuller and Northrup contract?

A. It was from the fall of 1861 to the fall of 1862.

Q. 35. How much coal did you take out during that time?

A. Well, I couldn't exactly judge. We might took out about seven or eight thousand tons. I don't remember exactly.

Q. 36. Now, from the fall of 1862 to the fall of 1863 what was being done there?

A. Mining.

Q. 37. Under whose charge?

A. That was under the company's charge.

Q. 38. Were you working there?

A. I was there looking after it, sir, all the time; had charge of it for the company.

Q. 39. From the fall of 1862 to the fall of 1863 about how much coal did you take out?

A. I think that we must have taken out probably fourteen thousand tons that year. It was increasing very fast. There was about fourteen teams hauling there.

Q. 40. How many men did you employ there during that time?

A. Probably from fifty to sixty that year.

Q. 41. Where did these men live at that time?

A. They lived in the hotel, sir, belonging to the company; that is, most of them did.

Q. 42. From the fall of 1863 to the fall of 1864 what was going on there?

A. Mining also.

Q. 43. Who was carrying on the mining that year?

111 A. The company was the principal men, and I was the agent under them, looking after the miners and the mine.

Q. 44. During that period, from the fall of 1863 to the fall of 1864, how much coal do you think came out of there?

A. I think we took some more out that year; increased all the time. I recollect a few months any way we had took two thousand tons, and shipped them away, and we took as high as twenty-four hundred tons some months; but as to the total amount I couldn't say, but it must be about probably fifteen or sixteen thousand tons in the year, but I couldn't positively tell.

Q. 45. From the fall of 1864 to the fall of 1865 who was carrying on coal mining there?

A. I believe the new company bought in about that time.

Q. 46. The present company?

A. Yes, sir. I wouldn't be positive, but I rather think that is the year they bought in there.

Q. 47. Were you superintendent of the mine during that period also?

A. Well, I was a portion of the time, but when the new company came in they appointed a new agent, of course, and he took my place. I was there some time after the new company had possession, after they bought it.

Q. 48. What were you doing there?

A. I was looking after the mine until the new agent came there to take my place.

Q. 49. After he came there what did you do?

A. I went then west of there under another company and sunk a slope on what we called the San Francisco mine; that is the name of it. It is a piece of land that belonged to Pioche.

Q. 50. How far was this San Francisco mine, as you call it, from the Black Diamond works?

A. Well, about a mile, I should think, west.

Q. 51. On the same strata of coal?

112 A. Yes, sir; that is what we supposed that it was, the same formation, a continuation. It changed a little in character in the distance sometimes, but it resembles it, and the supposition was that it was the same strata. Won't you correct that? The owner of the San Francisco was not Pioche, but Charlie Minton and B. H. Ramsdell and others in the city here, and Pioche was the owner of the quarter section between the San Francisco and the Black Diamond.

Q. 52. Do you know the town of Nortonville?

A. Yes, sir.

Q. 53. When did that begin to grow into a town?

A. About 1864 and '5.

Q. 54. What were its inhabitants as to occupation?

A. Coal miners.

Q. 55. Where did they get their labor from whence they made their living?

A. From the Black Diamond Coal Company. That is where they were working, and a few in business, such as there might be a store there or a saloon or two. Of course they made their money from the miners.

Q. 56. Whereabouts did you have your abode?

A. I lived on section 8, sir, from 1861 to the fall of 1870.

Q. 57. Now, I would like to have you describe generally this deposit of coal, its extent and direction, and how it compared, if you know, with the other known coal deposits on this coast with reference to its extent?

A. Well, it compares very favorable. The situation of the mine and the coal it was about as easy a place to prospect as I ever saw, and to open a mine without expense.

Q. 58. Was the deposit large or extensive or small or what?

A. Well, it was running very regular, the most regular of any place in Mount Diablo district that I ever seen in this portion of it.

Q. 59. What was the size of the vein?

A. One of them about four feet four—from four feet to four feet four.

Q. 60. What do you call that?

A. That is the Black Diamond vein. I have seen it as high
113 as five, but other places again it would come down some. The Clark vein was about two feet ten to three feet; that is about the average of it.

Q. 61. How was it cased?

A. The Clark vein was cased with sand rock.

Q. 62. And the Black Diamond?

A. The Black Diamond with black slate; some call it shale.

Q. 63. How was the land upon which the mine was situated with reference to its being level or steep?

A. It is right on the side hill, very steep and rocky, generally.

Q. 64. What sort of land was it for agricultural or pasturage purposes?

A. Well, you would find a little wild oats through it at that time amongst the sand rock, but it was no agricultural land, nor no land to cultivate. It is mining land in its character, generally. Where you find mines it is the roughest country, generally.

Q. 65. Was the land good for anything for agricultural purposes?

A. Well, I couldn't say. I didn't see no effort to put gardens in; never did in my time there. I would like to get a garden very well, but no water there. I never tried a garden there, and never seen one.

Q. 66. Then I understand you to say that you worked there for five years, from the fall of 1861 to the fall of 1865?

A. Yes, sir; and I went back there afterwards, *afterwards* after this company took possession under the new agent. I worked for this company afterwards.

Q. 67. What time?

A. That was in 1867, I believe; I took a contract there and worked a year under that.

Q. 68. At what business did you work there then?

A. Coal mining. That was at the head of this chute. The coal I took out was let down there altogether to the bottom.

Q. 69. How much coal did you get out that year?

A. Probably about fourteen thousand tons; I couldn't tell certain, but I think about that.

114 Q. 70. What was the quality of the coal; what was it good for?

A. For steam purposes; that is what they use it generally for. It is better adapted for that. They used it on the river boats then. The Steam Navigation Company was buying it generally, and used it altogether for a year or so.

Q. 71. Do you know what it sold for in San Francisco along from 1861 to 1865?

A. It has been selling from nine dollars up to *to* twelve, you might say, a ton.

Q. 72. How was the demand for it?

A. Very good, sir.

Q. 73. Do you know whether or not from 1861 down to 1865, including 1865, there were any other coal mines producing coal in this State except the mines upon this strata that you have been speaking of?

A. I don't know of any except the Black Diamond, and, on the Summersville side, a continuation of this strata.

Q. 74. In 1867, when you went back there the second time, what improvements had the company put on the land for the purpose of working the mine and for the men?

A. They built a railroad from New York landing up to the mine, and built new bunkers down at the foot of the hill in what we call Nortonville now, large ones; some of them would hold two thousand tons, I suppose, might be more; I don't know the capacity. They erected hoisting works there; put in machinery.

Q. 75. What kind of machinery?

A. Well, they are about as good, I guess, as there is in the State.

Q. 76. What was the character of the machinery, not with reference to its quality, but what was it for?

A. Hoisting coals.

Q. 77. What did the hoisting apparatus consist of, engines?

A. Engines, yes. They have two stationary engines there now, but in 1867 they didn't have two then. The big shaft was sunk after that, and the big engine was put on then, but the Mount Hope was in operation at that time, and a stationary engine then.

115 Q. 78. How many men were they employing there in 1867?

A. I expect there must be two hundred there.

Q. 79. And where did these men live; have their habitations?

A. A good many of them lived in Nortonville in 1867, and probably about sixty or seventy of them, might be eighty, on this portion of section 8 that we are talking about. There was a hotel there and

a hotel down at Nortonville, and several dwelling houses besides, for families.

Q. 80. Where did the steamers of the Steam Navigation Company, which you say were running on the river, get their coal; where was it delivered to them?

A. Down here at San Francisco at that time. The extensive wharves wasn't built there at the landing then, and the conveniences that there is now—well, they might be in 1867; I can't say positive as to that, but from 1861 up to 1865 there was no conveniences like there has been since. They used to ship it down here on these scow schooners to the wharves here, and they coaled the steamers from here.

Q. 81. How did you come to go up there in 1861?

A. I came down here from Sierra county, and there was a man here looking for two coal miners, and a friend of mine and me came down together, and I told my friend that I had to go back to Sierra county. I was a little interested in a mining claim there, and I had to go back to look after it, and for him to go up to this new coal discovery, to see what there was there, and then write me and let me know if there was any foundation to it or not. It was new then.

Q. 82. Then, in consequence of what he wrote to you, you went there?

A. Yes, sir; he went up and see the favorable location of it. There was men on this section 8 chopping wood when he went there on a Sunday to look around, and he see the coal there, right out, and these men chopping wood didn't know the value of it, and he got those men and bought them out—got the possessory right they had for five hundred dollars, I believe, and then he wrote for me to come down, that there was a good place there; that we could make money. He wanted me to come, and he thought that I had
116 better judgment than he had. That is the way he wrote. Then in about six weeks he sold out for three thousand dollars; his interest out of it, a quarter. The other three that was interested went in with him, and paid five hundred dollars for the claim.

Q. 83. What was the claim bought for; for wood?

A. No, sir; to mine coal on it. He started a tunnel right off.

Q. 84. When you went there and examined the land, from your experience in coal mining, did you or not then form any opinion as to whether or not that was coal land?

A. Yes, sir. I was satisfied that it was a good place for a coal mine, and that there was a permanent appearance there for a coal mine to continue, and I was mad to myself for not going up there with my friend when he went. If I had we would have had the whole thing to ourselves, and kept it; that is what I was mad for.

Q. 85. From your experience as a miner of coal, and from what you saw during the years you were there, was or was not that north half of section 8 coal land?

A. Decidedly so; yes, sir.

Q. 86. Was it or not valuable for any other purpose?

A. I wouldn't consider no value to it except for that purpose. I

wouldn't take it for a gift for any other purposes. I have seen it sold for a hundred thousand dollars where a cow couldn't live on a piece, and there must be something on it besides the agricultural quality of it.

Q. 87. You say you were there in 1867. Were you there at work at any later period than 1867?

A. Part of 1867 and 1868. I left there in 1868, I believe it was.

Q. 88. Do you remember what time of year it was?

A. No; I dont remember exactly what time.

Q. 89. Well, spring or fall?

A. I think it was in the fall.

Q. 90. Now, at the time you left, when you were last there, what was going on there?

117 A. Coal mining all the time; quite extensive too.

Q. 91. And were these improvements that you have mentioned as being there in 1867 there in 1868 also?

A. Yes, sir; and they have been adding to them. I was up there a year ago last winter, and there has been a good deal of valuable improvements put on there since.

Cross-examination by Mr. BROOKS:

Q. 1. When you first went there had any coal been taken out?

A. Yes, sir.

Q. 2. How much?

A. Well, I couldn't say how much. Probably they had shipped six or seven hundred tons before I went there; I couldn't say positively. I should think so from the excavation that they had made, and the tunnels. It might be more. I rather think it was more than less. Yes, it must be more than that.

Q. 3. Well, how much?

A. Well, I couldn't say, because I wasn't there.

Q. 4. How much should you judge, from the excavation?

A. Well, I should judge it was more than that.

Q. 5. Was there any coal taken out of the Cumberland tunnel?

A. Yes, sir.

Q. 6. How much?

A. Well, I couldn't say how much has been taken out from there, but there has been a good deal of coal taken out from there.

Q. 7. Was it in use then?

A. Yes, it was in use then.

Q. 8. How long was it used afterwards?

A. Well, probably two years, or three—two years possibly. I don't recollect exactly.

Q. 9. Was there any other name for that tunnel?

A. No; not that I know of.

Q. 10. That was not the Clayton tunnel?

118 A. No, sir; the Clayton tunnel way way below there. There was two old tunnels back of or above the upper Black Diamond of all, and we called them both Cumberland tunnels, number one and two, at that time. They were on the same vein.

Q. 11. Then where was the Clayton tunnel?

A. The Clayton tunnel was down at the foot of the hill.

Q. *11.* Below the Upper Black Diamond?

A. Yes, sir.

Q. 12. When was that made?

A. I should think that was started about 1864, possible 1863 or '4; either the latter part of 1863 or 1864.

Q. 13. Was that used to get out coal?

A. Yes, sir; it has been in use; yes, sir.

Q. 14. What was the character of this coal as coal?

A. Lignite; that is the character of it.

Q. 15. That is not true coal, is it?

A. Well, no; the geologists generally don't term it with that term, but a great many of the late authorities think that it is coal after all now, only it isn't quite so good as the old stratas. It is newer coal; that is all the difference, and probably the wood wasn't so hard before it was carbonized; hasn't got the density and the purity as the old formation had.

Q. 16. Have any of these mines that you speak of been worked to any profit besides the Black Diamond mines and the Summerville?

A. What other mines do you have reference to besides them?

Q. 17. Those that you have mentioned. You have mentioned the Manhattan, the Union, the Eureka, the Pittsburg, and the Independence. Were any of those mines working to a profit?

A. I couldn't say. I have never seen their books, and never heard it discussed, but I should think they had. I know there ought to be profit on it from what they paid for labor and what they got for the coal.

Q. 18. Is all the coal on the Pacific coast of this character?

A. No, sir; not all of it.

119 Q. 19. Wherein does it differ, and what coal differs?

A. Well, it differs up in some portion of Washington Territory and Vanco-ver Island.

Q. 20. That is not lignite?

A. Well, it is older formation than this—a better quality of coal.

Q. 21. Is all the coal in California, Washington Territory, and Oregon of this character?

A. Well, all the coal in California; I don't know of all the coal in California; I couldn't answer; I couldn't answer only what I have seen; near all the coal I have seen in California is about the same character as this Mount Diablo.

Q. 22. How about Oregon coal?

A. They have Oregon coal; there is a good deal of difference in it; that is, some, but not so much as the Vancouver Island coal.

Q. 23. Have not indications of coal been discovered very generally in California?

A. There has been indications, but I don't know of any paying coal mines working in California now, except in Mount Diablo district; I know of a great many places where they have been prospecting for it.

Q. 24. What do you mean by their prospecting for it?

A. Well, seeing indications, and then running tunnels in on it.

Q. 25. Did they see coal?

A. In some places they have before they started, and other places they struck it after they started; they would see the slate, or slate on the surface; there is some coal down near Carmel bay, Monterey county; they have been prospecting there, but I don't know what success they have.

Q. 26. Do you know Corral Hollow?

A. Yes, sir.

Q. 27. How about that?

A. All I know, they don't mine there.

Q. 28. They did, did they not?

A. They did, some years ago, I believe—tried it some there.

Q. 29. Do you know how it turned out?

A. Well, only from hearsay.

Q. 30. What was that?

120 A. That they lost money by it; most all that was connected with it.

Q. 31. How far did they prospect; to what extent did they carry their prospecting?

A. I couldn't say as to that; I was down one shaft there, about three hundred feet.

Q. 32. How is that situated with respect to these Mount Diablo mines; how far distant, and in what direction?

A. Well, they must be, probably thirty miles distance between them; I couldn't say positive, but I think about that.

Q. 33. Is it the same mineral?

A. Well, that is what I couldn't say, whether it is or not; if it is, there is a great change in it; the strata of coal has changed in the distance between Mount Diablo and Corral Hollow, if they are the same; I don't say that they are; the pitch of them is different; the Mount Diablo pitch is about twenty-seven degrees, and Corral Hollow probably about fifty or fifty-five, where I have seen it there.

Q. 34. What are the deposits of coal between Corral Hollow and the Black Diamond?

A. Well, there is indications here and there through on the hills, right along there; well, from the Black Diamond, I guess, to the marsh grant there is indications all through there for twelve miles; maybe more—twelve to fourteen miles between there and Corral Hollow.

Q. 35. That is, from the Black Diamond to the Marsh grant?

A. Yes, sir.

Q. 36. Is that in the direction of Corral Hollow?

A. Yes, sir.

Q. 37. How is it from there over to Corral Hollow?

A. I don't know of any there from the marsh grant, or about two miles beyond the marsh grant, to Corral Hollow; there is indications for about fourteen from the Black Diamond over toward Corral Hollow.

Q. 38. And then you say there is none till you get to Corral Hollow?

A. Well, none that I know of; I don't say that there is none, but not to my knowledge.

Q. 39. You have not examined?

A. I have never seen any.

121 Q. 40. Have you looked for it?

A. Yes, sir; I have looked—travelled over the ground, but I didn't spend much time. I have been on foot and on horseback part of the way.

Q. 41. Where is the next nearest indication of coal to the Black Diamond mines?

A. Do you mean Pittsburg, Summersville?

Q. 42. No, I didn't mean those; I counted those as a part of the Black Diamond mines.

A. The central, I suppose; the first after you leave the Pittsburg.

Q. 43. Where is that?

A. That is in the direction of Corral Hollow from Summersville; well it is about three-quarters of a mile from Summersville, probably.

Q. 44. Is that worked?

A. It has been worked. I don't know whether it is working now or not.

Q. 45. Are there not indications of coal across the river there—over towards Sonoma?

A. Not that I know of, sir; there might be, but I don't know of any, except there is a little indication at American Cañon, Solano county. They have prospected some there, but it never proved to be a workable vein.

Q. 46. That is to say, the coal was not in sufficient quantity to make it profitable, I suppose?

A. That is as far as I know.

Q. 47. Did you not hear of coal prospects in Sonoma county?

A. I have heard of it—seen it in the papers, but I don't know anything of my own knowledge.

Q. 48. Are not these coal prospects very common in the State, north of Monterey and west of the Sierras?

A. I don't understand your question.

Q. 49. As a matter of common repute and common knowledge, is it not a very common thing to find these indications of coal, and prospecting for coal, in the tract of country north of Monterey and west of the Sierras?

A. Well, not that I know of. There is several spots in California here along the coast range where you will find indications of

122 coal. In the coast range there is several places; in Fresno county there is some that I have seen, and in the eastern part of Monterey county, at the head of San Benito creek; there is an indication there of coal, but I can't say whether they ever could profitably mine there or not.

Q. 50. Santa Cruz?

A. Yes, sir; Santa Cruz; I haven't seen anything there worth spending five dollars on.

Q. 51. That is not lignite?

A. No; not in Santa Cruz that I know of. I went down there once to look after a coal mine, but I couldn't find it.

Q. 52. You did not find any coal?

A. No; I found black sediment there.

Q. 53. Haven't you seen any indications of coal in San Francisco county?

A. No, sir; not that I know of.

Q. 54. Don't you know that they are mining for coal down on the ocean front?

A. No, sir; I do not.

Q. 55. From the fall of 1861 to the fall of 1862 were there any other coal operations or workings on section 8 than you have spoken of?

A. Not that I know of, sir; there might be, I don't know.

Q. 56. You know whether or not anybody else was working for coal there at that mine besides you?

A. I haven't referred to the Black Diamond at the time. Yes, there was, probably, sixteen or twenty men working there besides me.

Q. 57. You don't answer my question. I don't know whether you understand it or not. From the fall of 1861 to the fall of 1862 were there any other coal operations or workings on the north half of section 8?

A. Not that I know of that I recollect now, except what I have stated before.

Q. 58. From the fall of 1862 to the fall of 1863, when you had charge of the mine for the company, were there any other coal workings on the north half of section 8 besides those which you have testified to?

A. Not any except that that was under my charge, sir.

Q. 59. From the fall of 1863 to the fall of 1864 were there
123 any other coal workings there than those which you have testified to?

A. About the same, as far as I recollect.

Q. 60. From the fall of 1864 how long did you continue operating before the new company took charge?

A. In that year?

Q. 61. Yes.

A. I don't remember exactly what time they did buy there—such a long time, and I never thought of it.

Q. 62. That was some time in 1865, was it not?

A. Well, I couldn't swear, as I said before, whether it was 1864 or 1865. About that time it took place.

Q. 63. And you can't tell how long you were working or how much coal you took out?

A. I couldn't tell exactly; that is, to the month, nor, possibly, to the year, now.

Q. 64. Well, from the fall of 1864 to the fall of 1865 how much coal did you take out?

A. Well, I am satisfied the company took out that year probably forty thousand tons probably that year. They were increasing

every year very rapidly. It might have went up to sixty; I can't say.

Q. 65. From the fall of 1865 to the fall of 1866 how much coal was taken out, do you know?

A. Not positive; no. They were mining very extensively there.

Q. 66. Give us your estimate.

A. Well, I should think they took out forty to fifty thousand tons that year.

Q. 67. And from the fall of 1866 to the fall of 1867?

A. They have took full as much that year out.

Q. 68. And from the fall of 1867 to the fall of 1868?

A. Well, they were continuing to increase all the time.

Q. 69. How long did that increase continue?

A. Well, I have seen a report that they took out as high as one hundred and thirty thousand tons a year there for some year or two—seen it in the paper. I have no way of knowing how many tons they took out every year—none of my business. I was only working for wages. I know they were running very extensively.

124 (Here a continuance is taken until Saturday, August 9th, 1879, at ten o'clock a. m.)

SATURDAY, *August* 9, 1879.

Present: Mr. Barnes, of counsel for complainant; Mr. Brooks, of counsel for defendants.

(No witness appearing a further continuance is taken until Saturday, 23d instant, at ten o'clock a. m.)

SATURDAY, *August* 23, 1879.

Present: Mr. Barnes, of counsel for complainant; Mr. Leviston, of counsel for defendants.

Depositions—G. H. Thompson.

Examination-in-chief of G. H. THOMPSON by Mr. BARNES:

Q. 1. State your name, age, occupation, and residence.

A. Name, G. H. Thompson; age, forty-four years; occupation, civil engineer and surveyor; residence, San Francisco.

Q. 2. How long have you been engaged in the practice of your profession?

A. About nineteen or twenty years.

Q. 3. In the year 1864 did you have any relations with the United States Government in respect to your profession of surveyor?

A. I was United States deputy surveyor in 1864.

125 Q. 4. When did you commence to act as such, and how long did you continue so to act?

A. I received my first appointment in 1860, I think, as United States deputy surveyor, and continued to act as such during the greater portion of the time up to 1875 or '6, and have at different times since that occasionally been deputy up to the present time. I

hold a commission at the present time as United States deputy surveyor.

Q. 5. Look at the document now shown you, marked Exhibit "A," Thompson, and state what you know about it.

A. This appears to be a certified copy of the field-notes which I made in 1864 of a portion of township 1 north, range 1 east, Mount Diablo meridian.

Q. 6. Did you make that survey?

A. I did.

Q. 7. At what time?

A. In the spring of 1864.

Q. 8. For whom did you make it?

A. I made it under an order and instructions from the United States surveyor general.

Q. 9. Did that survey include the north half of section 8, in township 1 north, range 1 east, Mount Diablo meridian?

A. It did.

Q. 11. What, if any, work was being done in the way of mining upon that section when you made that survey?

A. There were several coal mines being worked at that time and prospecting going on in the way of running tunnels and sinking shafts, &c., on section 8. I cannot recollect about the half section now, but I could by examining the points laid down on the map. My impression is that most of the mining that I noticed was on the south half; that is my recollection. It has been a long time ago, but by examining the field-notes I can tell.

Q. 11. Look at your field-notes and state more fully, if you can, what improvements in the way of mining there were on the north half of section 8, and what was going on there in the way of
126 mining at the time you made that survey.

A. (After referring to Exhibit "A," Thompson.) Well, there were several mines opened in which they were mining and taking out coal, and there were coal-bunkers, chutes, and so on; several tunnels.

Q. 13. I call your attention to your field-notes where you say: "25.00. Pass about 4 chains north of the Cumberland Coal Mining Company's coal-bunkers and improvements." Were those on the north half of section 8?

A. They were.

Q. 14. I call your attention also to the following in your field-notes: "61.50. Coal shed of the Black Diamond Coal Mine, the tunnel of mine about two chains southeast; thence ascend rocky hill." Was that on the north half of section 8?

A. It was, sir.

Q. 15. How extensively was the mining business going on there at that time. Can you give us any idea?

A. I went into the Cumberland mine first. I think there was a tunnel several hundred feet. It has been a long time ago, and I cannot tell to what extent, but it was pretty extensive. They had taken out a great deal of coal there. There was a tunnel several hundred feet, and I think at the end of the tunnel there was an in-

cline that went to a considerable depth into the earth. At the Black Diamond there was a tunnel that ran in several hundred feet, where they had taken a quantity of coal out, and which they called the old tunnel. There was another one near that—I think about west of it—which had been run in. I believe it was lower down the hill. That was in several hundred feet, and the end of the tunnel was just in the face of the vein. I went into the tunnel with the superintendent of the mine, and he was showing it to me, and thought that they had found a large vein of coal. He had just got into the vein and faced it up.

Q. 16. What buildings for the accommodation of miners and others engaged in that business were there at that time on this north half of section 8, if you remember?

A. I do not remember. At the mine there was built extensive sheds, and, I think, coal-bunkers. Right in the immediate vicinity there was quite a mining camp of houses. I think there
127 was a hotel there, and quite a number of houses and improvements. I think that was on section 5. It was right in the immediate vicinity; the line ran right past these houses, and I think the most of them were on the north side of the line. At the Cumberland coal mine there was a boarding-house and coal-sheds.

Q. 17. Could you form any estimate of the number of people apparently engaged there in the business of coal mining?

A. Right at this particular place?

Q. 18. Yes.

A. No; I do not remember; there were quite a number, though. There were a great many mines being worked there and opened round in that vicinity.

Q. 19. Before you made that survey did you have any knowledge of the character of that district with respect to coal mines?

A. None, except by reputation—what I had heard of it from other parties. That was the first time that I had ever been on the ground, when I went to make that survey. I had heard other parties speak of it frequently as being a coal district; coal mines there.

Q. 20. Were those lands included in the description of the north half of section 8 and the south half of section 5, then known coal lands?

A. They were. They were known well to be coal lands; considered as such.

Ex. "A."—(Counsel for complainant puts in evidence Exhibit "A," Thompson, above referred to, being a certified copy of field-notes of subdivision lines of T. 1 N., R. 1 E., Mount Diablo meridian.)

Q. 21. Did you make a plat of that survey?

A. I made a sketch which was attached to the field-notes, and the official plats were made by the draughtsmen in the surveyor general's office.

Q. 22. From what?

A. From the field-notes and the sketch which accompanied them.

Q. 23. Where are those plats now deposited?

128 A. There is one on file in the United States surveyor general's office, one on file in the United States Land Office, and

one on file in the General Land Office at Washington. The plat is made in triplicate.

Ex. "B."—(A certified traced copy of the official plat of T. 1 N., R. 1 E., Mount Diablo meridian, is put in evidence by complainant, and marked Exhibit "B," Thompson.)

(Here a continuance is taken until Saturday, August 30th, at ten o'clock a. m.)

SATURDAY, *August* 30, 1879.

Present: Mr. Barnes, of counsel for complainant; Mr. Leviston, of counsel for defendants.

Deposition of Asher Tyler, (sworn.)

Mr. BARNES: Q. State your name, age, occupation, and residence.

A. My name is Asher Tyler; my age is 46; my residence is San Francisco, and my occupation is insurance broker.

Q. Where did you reside, and what was your occupation, in the year 1864?

A. I was at Nortonville, at the coal mines, until March, 1864, for three years previous to that. I was then away two years, and again returned in 1866, and remained there until 1876.

Q. Then, with the exception of the interval which you have mentioned, your residence was continuously at Nortonville?

A. Yes, sir.

Q. What was your occupation there in 1866, and previous?

129 A. I was one of the owners of the Black Diamond mine, and superintendent of the mine 3 years previous to that.

Q. Previous to what?

A. Previous to 1864. I might say from November, 1861, until March, 1864.

Q. Do you know the piece of land described as the N. ½ of section 8, in township 1 N., R. 1 E., Mt. Diablo meridian?

A. I do.

Q. When did you first know that land?

A. In 1860.

Q. In what way was your attention called to it?

A. About the time that I purchased an interest in it. The land was pointed out, a portion of the stakes on the line of that land, and I knew about what the land was, about where it lay.

Q. When, if at all, was your attention first called to it as land containing coal?

A. In June, 1860.

Q. Did you visit it?

A. I did.

Q. What did you do with reference to the land or an interest in it?

A. Well, in June, the first time I went there, they merely shewed me the coal they got, croppings of coal. They shewed me some specimens of the coal; and from what information I could get I thought I would like to have an interest in it.

Q. Did you acquire an interest in it?

A. I did.

Q. How long did you hold that interest?

A. I acquired it in 1860, about July, possibly August, I think in July, though, and held it until some time in 1863. In the early part of 1863, I think, I sold out.

Q. During the time you held it how was the property known—as what?

A. As the Cumberland and Black Diamond mine.

Q. During the time you held your interest what work, if any, was done upon the land in the way of mining for coal?

A. Well, we commenced running out tunnels and taking out some coal in the fall of 1861, which we shipped here to this market,
130 I don't remember now how much; not a great deal, but quite a good many tons. No; I am wrong. That was in the fall of 1860 that first came down. In 1861 we shipped down, I presume, from 2,000 to 3,000 tons, during the summer of 1861. In 1862 we got the mine open so that we were shipping, I presume, about 1,000 tons a month that summer, say, 6 or 7 months, perhaps 8 months, of that year. In 1863 we shipped more. I think we shipped, say, 1,500 tons a month for 7 or 8 months of the year.

Q. What openings and works were there there during these years, and what facilities for getting out the coal?

A. There was one opening, called the Cumberland tunnel, on the old Cumberland claim. There was another one on the Black Diamond quarter section adjoining. Then in 1864 we opened an incline on what we called Clark's vein. That is all the openings we made up to that time.

Q. When, during these years, the coal was taken out of the mine, how was it handled from the mouth of the mine?

A. All the coal that was brought out was thrown on some planks at the mouth of the tunnel and then shovelled off into wagons and hauled away with ox teams, and very shortly after, I am not sure whether it was in 1861 or early in 1862, we built the first coal-bunker. We were receiving the coal as it came out of the mine. After that it was taken out from that or some other coal-bunker that was erected.

Q. What roads, if any, were there for hauling coal from there to the place that you hauled it to for shipment?

A. First an old road was laid over the Cumberland claim. I don't know as I can describe it. It was not a road at all. It was a natural road. We did very little to it. It would take 5 or 6 yoke of oxen to pull the teams up, and then we would rope all the wheels to send it down. There was not much road to it. In 1862 we built a road down the cañon from the Black Diamond and Cumberland mines out into the plain.

131 Q. Where was the shipping point?

A. New York landing.

Q. Is that the point where coal is shipped from now?

A. It is.

Q. Has that New York landing been a shipping point for coal from these deposits of coal since 1860 and up to the present time?

A. It has.

Q. In 1864 how much of a town was there at Nortonville?

A. At Nortonville and at the immediate mines they were dividing about that time from the old Cumberland claim, and the town was moved down to the foot of the cañon to Nortonville, perhaps half a mile down. I should think there were about 100 people; that is about my recollection.

Q. Living there in 1864?

A. Yes, sir; there may have been more.

Q. Where did they live or get accommodation?

A. They lived right there in the cañon and on the side hills; wherever they could put up a house. Everybody had to build their own houses. At that time they were allowed to build anywhere they pleased.

Q. Were there houses there?

A. There were.

Q. And how occupied?

A. Occupied by the miners and workmen.

Q. Was there any hotel at Nortonville in 1864?

A. Yes, sir; there was one there in 1864, and there was one also standing on the old Cumberland claim.

Q. Do you know who owned and carried on those hotels?

A. Yes, sir; the one on the old Cumberland claim, I think, was built by the company and leased to a party by the name of Scammon; he kept it a couple of years, probably. Then there was another one built in the fall of 1863, I think, or early in 1864, down at Nortonville, called the "Black Diamond Hotel." It was a small affair, where the miners, or a part of them, used to board.

Q. Was the population about those mines a mining population, or pastoral, agricultural people?

A. Mining entirely.

Q. Had these lands in 1864, or ever since, to your knowledge—the N. ½ of sec. 8 I refer to—upon which you say the Black
132 Diamond and Cumberland works were, ever been used, to your knowledge, for agricultural purposes?

A. They were not. I never knew of anything being planted or cultivated at all there, not even a tree, to my knowledge.

Q. Have you any acquaintance with lands sufficient to be able to say whether the land is agricultural in its character or not?

A. Well, I think I might be in some instances.

Q. Please give us a description of the surface of the ground upon the N. ½ of sec. 8.

A. Well, it is pretty short and rolling hills, the whole of it. It could be cultivated, but it is so dry that I don't think it would pay for cultivation. Possibly it might, though. A portion of it might be plowed, I suppose.

Q. What was it that gave value to the lands from 1860 on?

A. The coal deposits.

Q. Anything else?

A. Nothing else.

Q. From 1866, I unnerstand you to say, you resided there continuously until 1876?

A. Yes, sir.

Q. What took you back there to reside after leaving in 1864?

A. I met with a failure in San Francisco, and I went back there and purchased an interest in a hotel that was there, and I followed that business while I remained there.

Q. What hotel do you refer to?

A. The Black Diamond Exchange.

Q. How was that hotel supported at the time you went back there; what was its custom?

A. Miners—most entirely so. There was very little transient custom. We did not want to keep transient people, but if they came there we did the best we could for them.

Q. Did you return there for any purpose between the years 1864 and 1866, when you returned there to take up your residence there?

A. Yes, sir; I was there very frequently. Oh, yes, sir.

Q. What was going on there during that interval?

A. Coal mining.

133 Q. Was it increasing or decreasing?

A. It was increasing.

Q. From 1866, down to 1876, was there ever a day that that mine was not carried on there?

A. I think not.

Q. Was it an increasing or decreasing business?

A. It increased until 1874 or '5, I think, every year.

Q. Do you remember where the first machinery was erected at the mouth of the Black Diamond tunnel—what year—engines, &c.?

A. Well, on what we called the original old Black Diamond tunnel, there never was any machinery there. There was an opening made later. I think the first machinery that was erected there was at what we call the Clark vein, on that quarter section.

Q. Do you remember about when that was, and what it consisted of?

A. Well, I could not say whether 1865 or 1866 there was an engine put up there. It was during those two years any way.

Q. What was the amount of population in Nortonville engaged in these enterprises that you speak of, when you returned in 1866?

A. I don't know; but I should think, perhaps, 500 or 600 people.

Q. Were they all, or mainly, engaged in mining?

A. Most of them there was; some of them were building railroads.

Q. Railroads from where to where?

A. From New York landing to the mine, to transport the coal. It was a pretty lively place.

Q. How were those railroads operated?

A. They were operated first by horses; horse power in the first place, for a short time; afterwards by steam, by the use of the locomotive. They placed down steel rails and got the cars and run them over the track attached to a locomotive.

Q. Has that railroad, so constructed, continued there up to the present time?

A. Yes, sir.

Q. When first, if at all, were there any educational facili-
134 ties at Nortonville for the children of the families of the miners?

A. There was a school there, I think, about 3 months in 1866; and about 1867, I think, a public school was opened and has been continued there ever since, I believe about 1867. It might have been as late as 1868, but I think not.

Q. Who patronized or used that school?

A. All the children of the miners there.

Q. When, if at all, were any churches established there?

A. Well, I cannot remember, somewhere about 1870, possibly a little earlier. There was a church built there about that time.

Q. Do you remember the denomination?

A. I think Congregationalist.

Q. Has that society been maintained there ever since?

A. I think so.

Q. When first were stores for merchandizing established there, if at all?

A. There was a store there when I returned in 1866. I don't think it had been established long. I don't know but what it might have been there a few months. Since that there has been several stores.

Q. What was the size and mining population of Nortonville, as near as you can recollect it, in 1868?

A. Do you mean the whole population, old and young?

Q. Yes.

A. Well, I never knew, but my estimate was that there were near about 1,500 people in Nortonville about that time. There might not have been so many; I don't know. Perhaps that was a little too early for very many. I don't think there were so many in 1868.

Q. How was it in 1871, in the spring of 1871, on?

A. I should judge there would have been nearly that many there in 1871, perhaps not; I never knew.

Q. Was there any other thing to carry on there to support the population except the mining operations that you have spoken of, and the necessary stores and habitations for the support and protection of the mining population?

A. Not a thing.

135 Q. How long, if you know, has the Black Diamond Coal Co. been in possession of those mining lands—how long prior to 1876 or '7?

A. Well, they have been, or at least they were, in possession when I bought into it in 1860, and their successors have been in possession ever since.

Q. Now, in 1868, and during the whole of that year, was or was not the land contained within what we now know as the N. ½ of section 8, township 1 N., R. 1 E., Mt. Diablo meridian, known as coal lands?

A. About three miles and a half.

A. Yes, sir; they were.

Q. How extensively were those mines known at that time, if you are able to say?

A. Well, I cannot say how extensively. The coal was mostly shipped to this city, and some was shipped to Stockton, and some to Sacramento, and other places all around the bay; Vallejo, and probably other points. I think there was coal shipped to this place opposite San Jose; I have forgotten the name now.

Q. Alviso?

A. Yes, sir—Alviso; also to Oakland. It must have been pretty extensively known.

Cross-examination—Mr. LEVISTON:

Q. Do you know the line of the N. ½ of section 8 on the ground?

A. I have traced the stakes on one occasion clear around that half section.

Q. In what year did you trace the stakes?

A. That was in 1864.

Q. What time in 1864?

A. Pretty early. I know it was a rainy day, so it must have been pretty early in 1864.

Q. Are these mines and mining that you have been speaking of all in the N. ½ of section 8, or are they on other lands?

A. There are some on other lands now, I believe.

136 Q. Well, were they then?

A. Well, I don't know whether they mined the whole of sec. 8 or not; I suppose they have. I think there are some on sec. 5 now, but the early mining was done on sec. 8.

Q. In 1864 was there any means of taking the coal, or was there any coal taken out from the N. ½ of sec. 8?

A. Yes, sir.

Q. Was not the coal almost all removed on that north ½, section 8, and it used as a passage-way in 1864?

A. No; there was a great deal of coal taken out of section 8 as late as 1868, and I think later than that.

Q. Well, as late as 1868 had not all the coal been removed from the N. ½ of sec. 8?

A. I do not know that it is all removed yet. They are not mining there yet, I don't think.

Q. Did you know in 1868 how much coal was there?

A. No; I did not know how much. I know there was an incline cut down from that particular mine down to the bottom of the cañon, and there was a great deal of coal come down there. You could see a great quantity of coal coming down that incline any time you would look at it. I don't know how much.

Q. Was not the N. ½ of section 8 used as a passage-way to the mines which were on other lands?

A. No; I don't know that it was used as a passage-way at all.

Q. Was not the coal which was on other lands taken through the N. ½ of sec. 8?

A. No; not a pound.

Q. Have you any knowledge of the interior of those mines?
A. Some knowledge; some general knowledge.
Q. Do you know whether, in 1871, there was any coal left on the N. ½ of sec. 8?
A. I believe there is coal there yet.
Q. Do you know, is the question, of your own knowledge?
137 A. I don't know whether they mined there in 1871 or not. I don't remember.
Q. When where you in the mine in the N. ½ of sec. 8?
A. Oh, I have been in it within the last 4 months; 4 or 5 months ago I was up there, and went down in the mine.
Q. Do you know whether, in 1871, any coal was being taken from the N. ½ of sec. 8?
A. No; I don't know whether there was or not. I could not tell you.
Q. Do you know whether it was not practically worked out in 1871 or not?
A. I do not know.

Redirect—Mr. BARNES:

Q. Do you know Mr. G. H. Thompson, the United States surveyor?
A. I do not.
Q. Do you remember whether any United States surveyor was there making a survey or running lines in 1864?
A. I think there was one there.
Q. Early in the year?
A. Yes, sir; I think there was. I don't know that I met them, but I think I saw them at work there on the hills.
Q. But who composed the party, you do not know?
A. I don't know. I do not remember at this time who it was. I think I saw somebody there. Perhaps I knew them at the time, but I do not remember at this time who it was.

(Continued until Monday, September 15th, 1879, at ten o'clock a. m.)

MONDAY, *September* 15, 1879.

138 (Counsel for defendants being unable to attend, a further continuance is taken until to-morrow, 16th instant, at ten o'clock a. m.)

TUESDAY, *September* 16, 1879.

(By consent, a further continuance is taken until to-morrow, 17th nstant, at half-past nine o'clock a. m.)

WEDNESDAY, *September* 17, 1879.

Present: Mr. Barnes, of counsel for complainant; Mr. Leviston, of counsel for defendants.

[illegible] during the time you resided there?
A. About three miles and a half.

Depositions—Jno. A. Davis.

Examination-in-chief of JOHN A. DAVIS by Mr. BARNES:

Q. 1. State your name, age, place of residence, and occupation.

A. John A. Davis; twenty-seven years; Tuolumne county; miner.

Q. 2. Did you ever reside in the neighborhood of what are known as the Black Diamond coal mines, situated in Contra Costa county, in the State of California?

A. Yes, sir; I did.

Q. 3. When did you go there in that neighborhood to reside, and how long did you live there?

A. I went there in 1869, and lived there till 1874.

Q. 4. What were you doing during that period?

A. In the merchandizing business.

Q. 5. Whereabouts?

A. I kept a store right at Nortonville.

Q. 6. How far is Nortonville from the Black Diamond coal mine?

A. It is right there in the town; the mine is all there is of the town.

139 Q. 7. Do you know that tract of land known as the north half of section 8, township 1 north, range 1 east, Mount Diablo meridian?

A. Yes, sir.

Q. 8. What was the character of this land, as generally known, when you went there to reside?

A. It was simply coal land; there was a mine that was there; that was all; nothing else.

Q. 9. How large a population was there at Nortonville and about the mines at the time you went there?

A. There was in the neighborhood of fifteen hundred.

Q. 10. How was this population supported?

A. By the Black Diamond coal mines.

Q. 11. Was there any population there other than that composed of miners and their families, or people engaged in supplying miners and their families?

A. No, sir; no other business in the town.

Q. 12. What erections, if any, were upon the tract of land I have mentioned when you went there, and what were placed upon the land during the time you were there in the way of mining erections and improvements of that character?

A. In the town, do you mean?

Q. 13. At the mine.

A. There were the coal-bunkers, hoisting works, Mount Hope hoisting works, the Upper Black Diamond machine shop, blacksmith shop, and so on, necessary for the mine.

Q. 14. Where were the Upper Black Diamond tunnel and dump situated?

A. It was right upon the side hill; right up toward the Cumberland—what we used to call the Cumberland.

Q. 15. At that time were there any other mines open or being developed there beside the Black Diamond?

A. No, sir.

Q. 16. Do you know the Cumberland works?

A. Yes, sir.

Q. 17. What were they?

A. They were nothing comparatively; it was an old coal mine; I think, opened out from the Black Diamond; the tunnel did
140 all their work through the Black Diamond; what was known as the Cumberland mine, there was nothing there, only just three or four buildings that the miners lived in.

Q. 18. During all the years you lived there what business other than mining for coal was carried on there?

A. I never knew of any, only merchandizing; there was two or three stores there; they were all supported by the mine; that is, by the miners that lived there—that were employed by the Black Diamond Company.

Q. 19. Did you ever know of the land I have mentioned being used in any way for agricultural purposes?

A. No, sir; it is not fit for that.

Q. 20. What was the character of the surface?

A. It was a barren, dry piece of land, that nothing would grow on at all; no water there; nothing would grow there, trees or anything; it was anything but agricultural land.

Q. 21. How was it with reference to its being precipitous, or otherwise steep, hilly?

A. Well, it was very hilly.

Q. 22. Did you ever know of any cultivation of the soil for agricultural purposes during the time you lived there?

A. No, sir.

Q. 23. Was it capable of tillage or cultivation?

A. No, sir; nowhere around; nothing that would grow there at all.

Q. 24. What was it, if anything, that gave that land value?

A. The coal that was in it.

Q. 25. Is there any part of that land that is agricultural in in its nature, or that can be used for agricultural purposes?

A. No, sir.

Q. 26. Did you ever know of any attempt being made to form it, or to cultivate it in any way?

A. No, sir.

Q. 27. During the time you lived there where did agricultural products, or vegetables for domestic consumption, or other products usually raised on arable land, which were consumed there, come from?

141 They came from down below Clayton, in the valley, and down toward Antioch, down on the New York ranch. There was never anything that would grow there at all, anywhere around there, not even grass.

Q. 28. What was the point nearest to the tract of land I have mentioned where agricultural operations were carried on to your knowledge during the time you resided there?

A. About three miles and a half.

Q. 29. Were there to your knowledge any persons residing at Nortonville, or persons composing the population you have mentioned, who were engaged in any other pursuit than that of mining or of furnishing supplies and support to miners?

A. No, sir.

Q. 30. Who occupied these premises in 1871?

A. The Black Diamond Coal Company.

Q. 31. Has that company been carrying on coal mining in that neighborhood ever since to the present time?

A. Yes, sir.

Q. 32. What, if you know, is the present population of Nortonville?

A. I think that it is about eight hundred now.

Q. 33. What is the population composed of, as to the occupation of the people?

A. Miners and their families.

Q. 34. Up to the present time has there been any attempt to work this land, or any land in that neighborhood, for agricultural purposes?

A. I left there in 1874. I could now say now. Up to the time I left in 1874 there was never any farming going on anywhere around there.

Q. 35. Do you know what is the elevation of these lands above the level, say, of the San Joaquin river?

A. Yes. It is about fifteen hundred feet, I think.

Q. 36. How is the surface of the land with reference to its being broken, rugged, rocky?

A. It is very rocky and sandy—sand stone, hilly.

Q. 37. Do you know or can you state to what extent this land was commonly and generally known, if at all, as coal lands, from
142 the time you went to live there in 1868 to 1874?

A. It was known as coal land, and miners were producing a good deal of coal, shipping from eight to ten thousand tons a month.

Q. 38. How was the coal transported from there?

A. By a railroad—Black Diamond railroad.

Q. 39. To where?

A. Black Diamond landing.

Q. 40. Where was the landing?

A. At the junction of the San Joaquin and Sacramento rivers.

Q. 41. How long was this railroad?

A. About six miles.

Q. 42. Who owns this road?

A. The Black Diamond Coal Company.

Q. 43. Was it used for any other purpose than the transportation of coal and the carrying of supplies, and of people engaged in or having business at the mine?

A. No, sir; nothing more. They made from seven to eight trips a day.

Q. 44. Carrying what?

A. Carrying coal and supplies for the mine.

Q. 45. Do know where in San Francisco, if anywhere, the company had depots or places for the sale of coal which was produced on that land?

A. Yes, sir.

Q. 46. Where?

A. On Spear street, between Folsom and Harrison.

Q. 47. What did the company have there?

A. They had a large amount of coal—Black Diamond coal. They received some eight or ten thousand tons a month. They had barges and tug-boats for taking the coal from the landing to the city. They also shipped it to Stockton and Sacramento.

Q. 48. Do you know whether from 1868 to 1874 steamers plying on the river stopped at that landing for coal?

A. They did from 1870 to 1874.

Q. 49. What, if any, conveniences for shipping coal and for coaling steamers did the Black Diamond Coal Company have at the landing you speak of at the junction of the San Joaquin and Sacramento rivers?

143 A. They have a large wharf there and a chute that runs out over the steamers; dumps a car load of five tons on the the steamer. They can load a vessel of five hundred tons in a day there.

Cross-examination by Mr. LEVISTON:

Q. 1. In what business were you engaged at Nortonville during your stay there?

A. I was in the mercantile business.

Q. 2. Did you know the lines of section 8 on the ground?

A. Yes, sir.

Q. 3. You knew the corner stakes?

A. Yes, sir; I knew. I had frequently been on section 8 and knew the corner stake of the northeast corner. I knew where that was.

Q. 4. If this section 8 was cleared up do you know what its capabilities would be for growing agricultural products?

A. I think it would be very poor; in fact, none at all.

Q. 5. Would it not grow some things?

A. No, sir; very little.

Q. 6. Don't grasses and wild oats grow there now?

A. Not when I was there they didn't.

(Continued until Friday May 21, 1880, at 11 o'clock a. m.)

FRIDAY *May* 21, 1880.

Present: W. H. L. Barnes, Esq'r, of counsel for complainant; B. S. Brooks, Esq'r, of counsel for respondent.

144 *Depositions—F. Avery.*

Examination-in-chief of FRANCIS AVERY by Mr. BROOKS:

Q. 1. Are you one of the defendants in this suit?

A. I am.

Q. 2. Do you know the north half of section 8, township 1 north, range 1 east, M. D. M.?

A. I do.

Q. 3. What is the character of said tract of land?

A. Some of it is hilly, some rocky and broken, some rolling.

Q. 4. What is its character, agricultural?

A. Some of it would answer for cultivation—some portions of it. The greater part of it is good for grazing.

Q. 5. Is there any wood on it?

A. Very little. I believe there is one ridge that has some wood on it. There are some scattered trees in other places.

Q. 6 In what manner did you become interested in this land and under what circumstances?

A. Some time in February or March, 1871, John Mullan came to me to borrow some money, and offered me the State certificate of purchase for the half section of land which he showed me had been listed to the State in the previous January. He offered me that as security. I made the loan to him, and some time subsequent to that, not very long, he came to me and said that he not only could not pay me the money that I loaned him but he wanted some more money, and he offered to sell this to me, one half of it, which I purchased, and he transferred the whole of it to me.

Q. 7. Did you at that time know anything about the land?

A. Nothing whatever.

Q. 8. Had you ever seen the land?

A. No, sir.

Q. 9. Did you know of any claim made to it by any person?

145 A. None whatever. I considered that a State certificate of purchase, the land having been listed to the State, was a perfect title. I considered the title was perfect.

Q. 10. Did you have any intimation that it was claimed by any one, or that the listing was invalid or questioned?

A. None whatever. It never occurred to me that such a thing could be questioned. I will state that I was particular to find out whether this land had been listed, because I had been "bitten" by buying State certificates of purchase where the land was not listed; and when I attempted to get them listed I found that there was some hitch or other about the title, and they could not be listed. I was making purchases all the time of State certificates, and having once "burned my fingers" I was always particular that the land was listed before I would have anything to do with it.

Q. 11. Did you know, or have any reason to suppose, that the said land, or any part of it, was not agricultural in its nature or quality?

A. No, sir.

Q. 12. Or that it could not be used for agricultural purposes?

A. No, sir.

Q. 13. Do you know now whether that is true in point of fact?

A. Well, there are some portions of it that could not be used for agricultural purposes very readily. I suppose it could be used possibly.

Q. 14. Is there any of it that cannot be used for pasture land—that is, not suitable for that?

A. No, sir; it is quite as suitable as the foot hills are generally.

Q. 15. You mean to say that some portions of it are not arable?

A. Yes.

Q. 16. Some portions of it are arable?

A. Yes, sir.

Q. 17. Those portions that are not arable are fit for pasture?

A. Yes, sir; like thousands of other acres that I have owned, some of which I still own.

Q. 18. Do you know anything of any pretensions made by the officers of the State, or by Mr. Mullan, or any other person, to the officers of the United States, the Land Department, in regard to the character or situation of this land?

A. No, sir.

146 Q. 19. Do you know whether the agent of the State had any information in regard to this land except such as was derived from the records of the United States Land Office?

A. No, sir; I don't know anything about.

Q. 20. Did you combine or confederate *or* Mullan, to your knowledge, with any other persons for the purpose of unlawfully or fraudulently obtaining the title of this land from the United States?

Obj. (Objected to by counsel for complainant as leading, incompetent, and calling for the conclusion of the witness as to his acts, and not evidence of the acts themselves.)

A. No, sir.

Q. 21. Did you set on foot or promote any proceedings for such purpose?

Obj. (Objected to on the same ground as the last preceding question.)

A. No, sir.

Q. 22. Did you or Mullan, to your knowledge, make any false or any representations in regard to that matter?

A. No, sir.

Q. 23. In view of obtaining the transfer of the title from the United States?

A. No, sir.

Q. 24. Was your object and purpose in obtaining title to this land to harrass or annoy the Black Diamond Coal Mining Co.?

Obj. (Objected to as incompetent and leading in form.)

A. No, sir.

Q. 25. At the time that you obtained this title, did you know of that company having any connection with this land, or having anything to with it?

A. No, sir.

Q. 26. At the time of the transfer of this title to you, or at any time before that, had you the purpose or intention of instituting any suit against the Black Diamond Coal Mining Company?

Obj. (Objected to as leading in form.)

A. No, sir.

Q. 27. What was your intent and purpose in acquiring title to the said land?

A. Simply because I thought it was a good purchase, and I
147 could make something on it, as I bought other land.

Q. 28. Is the description of this land in the field-notes as hilly land and rolling hills, and the soil second rate, a fair and just description of the land?

A. I should think it was.

Q. 29. Is this land classified in the land office as mineral land?

A. I believe not.

Q. 30. Has either Mr. Mullan or yourself ever been engaged in the farming business?

A. No, sir; I have not and I don't suppose he has; I don't know.

Q. 31. What was his business at the time of his first connection with this land, if you know, or at any time since?

A. He was a land agent here in San Francisco.

Q. 32. At that date?

A. Yes, sir.

Q. 33. And how long did he continue prosecuting that business here?

A. Until he left here and moved to Washington, where he continues it.

Q. 34. That was some time after the commencement of this suit, wasn't it?

A. Yes; after the commencement of this suit in the United States court.

Q. 35. It was some time after the commencement of this suit when you say he went to Washington, where he continued in the same business?

A. Yes, sir.

Q. 36. Has he ever been engaged in the farming business to your knowledge?

A. No, sir.

Q. 37. Have you engaged in farming any of the land that you have owned?

A. No, sir.

Q. 38. Where have you resided with your family since you first had any connection with the title to this land?

A. In the city of San Francisco until two years ago the first of this month, when I moved to Sancelito, where I am now living.

Q. 39. Are you still transacting business in this city?

A. Yes, sir.

Q. 40. What use has been made of this land since you became the owner of it?

A. It is now rented for pasturage; has been for two years.

Q. 41. Have you made any other use of the land?

A. No, sir.

148 Q. 42. Are there any buildings upon it?

A. Yes, sir; I believe there are a few; four or five.

Q. 43. When was this matter of question in regard to the propri-

ety of this listing first brought to the attention of the Government, and how?

A. I don't remember the month, but I suppose it was some time in 1871; I think in the summer—early in the summer—and then at the instance of the Black Diamond Coal Mining Company.

Q. 44. Well, what was done?

Obj. (Objected to by counsel for complainant as irrelevant and immaterial.)

A. Well, the attention of the Land Department was called to this matter, and it was made to appear that the thing had been done improperly, and they were asked to take steps to recall the listing, which they did. By "they" I mean the Commissioner of the General Land Office.

Q. 45. Did you employ counsel to contest the matter?

A. Yes, sir.

Q. 46. Was it contested?

Obj. (Objected to by counsel for complainant as irrelevant and immaterial.)

A. It was.

Q. 47. And what was the final result of that controversy?

Obj. (Objected to by counsel for complainant as irrelevant and immaterial, and not the best evidence.)

A. The result was an affirmation of my title.

(Counsel for complainant moves to strike out the answer of the witness as responsive, and as giving his opinion as to the result.)

Stipulation as to Documents and Correspondence.

(At this point it is stipulated by and between the counsel for the parties that all documentary evidence, correspondence, and other papers or instruments of writing relating to the title of this land in proceedings of any nature in all or any of the Departments of Government at Washington, and all of the correspondence between the United States district attorney for this district and all or any of the
149 Departments of Goverment at Washington are offerred in evidence, and copies thereof may be substituted for the originals and used upon the trial of this cause, with the same force and effect as if the originals themselves had been offerred in evidence, subject only to such objections as might be made to the originals if they were produced.)

(It is also admitted that John M. Coghlan, late United States district attorney, died in the city of Oakland in the summer of 1879.)

Q. 48. Mr. Avery, when did you become a resident of San Francisco?

A. The 3d day of December, 1868, I think it was.

Q. 49. Where were you residing prior to that time?

A. New England, Massachusetts, and New York city.

Q. 50. Had you been in California before this date you speak of, December, 1868?

A. No, sir.

Q. 51. Had you ever had anything to do, prior to your coming here, with the purchase of public lands?

Obj. (Objected to by counsel for complainant as irrelevant and immaterial.)

A. Yes; once. I bought some land at Leavenworth, Kansas, at the time of the big excitement there.

Q. 52. Had you ever had anything to do with the listing of land or with State indemnity selections, or did you know anything about that?

Obj. (Objected to by counsel for complainant as irrelevant and immaterial.)

A. When?

Q. 53. At the time you came here?

A. No, sir.

Q. 54. At the time this purchase was made by Mr. Mullan did you know him or this land or anything about it?

A. I don't remember the date when he purchased it; I don't now remember the date.

Q. 55. August 21st, 1868, was the date of his application to purchase. Did you know Mullan or this land at that time?

A. No, sir; I didn't get acquainted with him until the year after that.

150 Q. 56. At that time you were not in this country, and had nothing to do with the location, certification, or purchase of the land in this State?

A. No, sir.

Q. 57. At the time you made your first transaction with Mullan in regard to this certificate of purchase had the land already been listed?

A. Yes, sir.

Q. 58. Did you ascertain that fact before making that transaction?

A. Yes, sir.

Q. 59. Did you know that at that time the Black Diamond Coal Mining Company or any coal mining company were operating upon that land?

A. No, sir.

Q. 60. Did you know that such a company, or any company or person, pretended to have or claim any title to that land?

A. No, sir.

Q. 61. Did you, before your purchase of the land, know that any person had been mining there, or that there were any mines on the land?

A. No, sir.

Q. 62. Do you know what is the character of the residue of that township?

A. The northen portion of the township is broken and hilly land.

Let us see: is it the northern or southern? I have never been over it. I can't figure out in my mind which way the sections run—whether they run toward the river, the high numbers, or whether it is back into the mountains. I think they must go, up to 36, toward the river; in which case the bulk of the township would be agricultural lands. I could not tell without looking at a map. I know one, two, three, four, up to six, are on the north line of the township, and this comes in the second range of sections; but for the life of me I don't know which way is north on that land. Yes; the bulk of the township goes back into the hills toward Mount Diablo; that is it; that is the way of it.

Q. 63. The corner of it must be the exact summit?

A. Yes; it goes back onto the mountain. What the character of the land back there is I don't know, but it must be very broken or rugged.

151 Cross-examination of FRANCIS AVERY:

Q. 1. By Mr. BARNES: What was the date, as near as you remember, when Mr. Mullan first applied to you for a loan of money to be secured by a pledge of his certificate of purchase of this land?

A. Probably somewhere in the latter part of February or the first of March, 1871; some time about the first of March, I guess.

Q. 2. What obligation, if any, did you take from him for the loan which you made?

A. I don't remember what I did take, but I probably took a note from him.

Q. 3. How much did you loan him?

A. I loaned him 500 dollars, I think it was.

Q. 4. What, if anything, at that time did he tell you about the land, its character or its value for any purpose?

A. He represented that it was agricultural land up in the neighborhood of Mount Diablo.

Q. 5. Did he say anything about there being coal on it?

A. He said that he considered it agricultural land; that he had other lands up there, some few miles from that; had one piece there that had some coal in it, and it was possible there might be coal in this, but he did not know. He said, being in that neighborhood it was possible that there might be coal in it. Coal might be discovered there. He did not know anything about it.

Q. 6. Was that all he said about it?

A. Yes, sir.

Q. 7. All the substance of it?

A. Yes.

Q. 8. How soon after that did you become the purchaser of his certificate of purchase?

A. Within two or three weeks.

Q. 9. When you became a purchaser of it how much money, in addition to the 500 dollars, did you give him?

A. I don't remember now.

Q. 10. Any?

A. Yes, sir.

Q. 11. Can you state approximately how much it cost you altogether at that time?

152 A. I could not from memory. I could by referring to my accounts.

Q. 12. I don't require a definite statement, but approximately.

A. I think it cost me about 1,500 or 2,000 dollars.

Q. 13. What instrument evidencing the purchase did you obtain from him?

A. Simply the assignment of the certificate of purchase to me.

Q. 14. Did you receive from him about that time any other instrument relating to this property?

A. Yes, sir.

Q. 15. What?

A. I would state that at the time I bought the land I proposed that the balance should be paid up to the State in order that I should get a patent for it, and he agreed to that; but he said it was not necessary. I told him I preferred to have it that way, and I sent the money up to Martinez to pay the balance on the purchase; sent the certificate up with the money, got the receipt on it, and it was returned to me, and I sent it up to Sacramento, with a demand for a patent. About the time that I got the patent—I think just at the time; perhaps the day after—I first learned that the Black Diamond Coal Mining Company was mining, or had been mining, on that land, and one or two persons came to me and spoke to me about it. Then I began to enquire into the thing, and found, as it appeared to me, that I had got hold of something that was more valuable than I expected. I then went to Mullan, and that was about the time—let us see; it was after the negotiations fell through or came to nothing for selling the thing and I made up my mind to bring a suit in regard to it—that I took an assignment from Mullan of his rights—any right of action that he might have in regard to the land. That is about the time of it; I don't remember the dates.

Q. 16. Do you keep books of accounts?

A. I used to.

Q. 17. Did you at that time?

A. I did at that time.

Q. 18. Can you, by reference to your books of accounts, ascertain the date of your purchase from Mullan, & the amount paid

153 by you for your half interest in the land?

A. Yes, sir.

Q. 19. Will you be kind enough to do so before your deposition is closed, and come prepared to tell us the date of your purchase of the half interest in the land, and the amount it cost you?

A. Yes, sir.

Q. 20. Have you now in your possession the instrument of transfer & assignment from John Mullan to you, whereby he conveyed to you certificate of purchase No. 1935 of the tract of land in question, which had been issued by the State of California to him, on the 21st day of May, 1869?

A. No other instrument than the assignment on the certificate itself.

Q. 21. Where is that certificate now?

A. In Sacramento, I think.

Q. 22. Have you in your possession an instrument of writing, dated the 28th day of March, 1871, sold, assigned, and transferred to you all of Mullan's rights or cause of action against the corporation, known as the Black Diamond Coal Mining Company?

A. I have.

Q. 23. Have you that with you?

A. No, sir.

Q. 24. Before your deposition is closed, will you be kind enough to produce it, or the copy of it, that it it may be annexed to your deposition?

A. Yes, sir.

Q. 25. Are you and Mullan still the owners, in the proportions you have mentioned, of whatever title you have to that?

A. Not entirely.

Q. 26. Who has since become interested in it with you, if anybody?

A. One or two persons have a small interest.

Q. 27. Please state who they are.

[A.] One of them is a man that I employed to help me get up testimony; his name is Henry Manwaring. The other is Mr. Brooks.

Q. 28. Mr. Manwaring was formerly an employee of the Black Diamond Coal Mining Company, was he not?

A. He was a miner employed by them. That is the only employment he had with them.

Q. 29. And the Mr. Brooks, you mean, is B. S. Brooks, Esq., of this city?

A. Yes, sir.

154 Q. 30. Are those assignments or transfers of interest evidenced by any instrument in writing?

A. Yes, sir.

Q. 31. Have you in your possession or under your control those instruments, or either of them?

A. Yes, sir.

Q. 32. Before your deposition is closed will you be kind enough to produce them, or the copies of them, so they may be annexed to your deposition?

A. Yes, sir.

Q. 33. Do I understand you to say that it was not until at or about the time of your purchase of an interest in this land from Mr. Mullan that you first heard of the Black Diamond Coal Mining Company having been engaged in mining for coal upon this land, or some part of it?

A. I think it was a day or two after I received the patent from Sacramento to this land.

Q. 34. Can you explain how it is that the assignment from Mullan to you of the certificate of purchase, and the assignment of Mullan's right or cause of action against the Black Diamond Coal Mining Company for waste, are dated on the same day, if the transactions occurred at different periods?

A. I don't know that they are dated on the same day; maybe they

are. I don't remember that they are dated on the same day. If they are, it must have been just as a matter of convenience.

Q. 35. Do you remember the date when you obtained the State patent for the land?

A. I think it was the same day that it is dated. (Copy of the patent shown to the witness.) Yes; it was probably on that day; I don't remember the day.

Q. 36. You got it at or about the time the patent bears date?

A. Yes.

Q. 37. Did you make the payment to the State between the time Mullan executed his first assignment of the certificate of purchase to you and the date of the patent?

A. I think probably I did. You mean the assignment of the certificate of purchase?

Q. 38. Yes.

A. Yes; he assigned it to me, and then I sent the money up with the certificate. I had the assignment made to me, so that I could get the patent in my own name.

155 Q. 39. How much money did you pay to the State to complete the transaction between you and the State and entitle you to the patent?

A. I think it was something upwards of 400 dollars. It was the eighty per cent. and interest.

Q. 40. What was the price at which the State sold the land?

A. A dollar and a quarter per acre.

Q. 41. How many acres did you buy?

A. 320. There had only been the first payment made on it.

Q. 42. Mullan had only made one payment?

A. Yes; I made the balance.

Q. 43. Well, then, including the payment to the State and the payment to Mullan, I desire that you will examine your books and report to us what that half interest cost you.

A. Yes, sir.

Q. 44. That is, including everything.

A. Yes.

Q. 45. How long after you got the patent from the State was it that you sued the Black Diamond Coal Mining Company?

A. That I don't remember. It might have been two months. I don't remember the time.

Q. 46. Did you or not know at the time you completed the payment to this State for this land, and at the time you paid Mullan for the land, or for the half interest in it rather, that it was valuable principally, or valuable at all, by reason of coal in it, or supposed to be in it?

A. No, sir; I did not. Mullan only casually mentioned that as a possibility, being in that neighborhood. He represented it to me as agricultural land. He said that while there was a chance, it being in that neighborhood, that it might have coal in it, yet he never represented to me that it had, and if he knew that there was coal there he didn't tell me so.

Q. 47. How was it that you paid Mullan so large a consideration

for the purchase of a half interest in 320 acres of land which the State was selling for a dollar and a quarter an acre?

156 A. I don't know. When I come to think about it—to see how much I paid on it—it seems to be a great deal. I may be mistaken in the amount, but I say because I have not referred to it. I will look at my account and tell you before I get through just how much it was. Two thousand dollars for the 320 acres would be about six dollars an acre, and it does not seem to me I could have paid him so much as that, and I don't believe I did.

Q. 48. Do you remember, in your suit against the Black Diamond Coal Mining Company for the possession of the land, how much you estimated the value of the coal which they had theretofore taken out of the land to be?

A. I think that suit was for thirteen hundred thousand dollars, wasn't it?

Q. 49. Yes, sir. When did you first, if ever, see the land yourself?

A. I don't remember what day of the month it was in. I think it was before that suit was commenced. That must have been in April or May; somewhere along there.

Q. 50. Then you had not been on the land prior to getting your State patent?

A. No, sir; I had never been there.

Q. 51. By what conveyance or means of travel did you reach the land?

A. I went up on the steamboat to some landing up there, and then drove up to the land in a buggy.

Q. 52. What was the name of the place where you left the steamboat?

A. Well, I really don't know whether it was Antioch or New York landing.

Q. 53. Was there any railroad in operation there at that time from the San Joaquin river to the town of Nortonville?

A. Yes; I think there was. I thing it was one Sunday I went up there. I have an impression it was on Sunday.

Q. 54. Did the road by which you went to the mine from the landing you made pass along or near the railroad?

A. I really don't remember, but my impression is that it did, some of the way.

157 Q. 55. The road follows the line of the railroad pretty much, doesn't it?

A. That I don't remember. I know one road does; I believe it does. I have never been over that road but once; that one time, and I don't remember particularly about it.

Q. 56. Did you go to the town of Nortonville?

A. Yes.

Q. 57. How long did you stay there?

A. About two or three or four hours.

Q. 58. How large a place was Nortonville at that time?

A. It was only a little village. I should think there might have been five or six or seven hundred people there.

Q. 59. What seemed to be the character of the population and the business that was going on there?

A. I suppose it was what would be called a mining village.

Q. 60. How far is Nortonville from this property?

A. It adjoins it. I am very confident that Nortonville is altogether on the adjoining section.

Obj. Mr. BROOKS: This is not cross-examination. I object to it as not cross-examination and not relevant.

Q. 61. By Mr. BARNES: Did you on that occasion visit the Black Diamond mine on this section?

A. Yes.

Q. 62. What did you find there?

A. I found some underground works, and went into them along the galleries.

Q. 63. They were quite extensive works, were they not?

A. Yes.

Q. 64. Did you find hoisting works erected there?

A. Not on this land.

Q. 65. Any machinery of any kind?

A. There was machinery on the adjoining land. I don't
158 think there was any particular machinery on this land.

Q. 66. Did you see any indications; and, if so, what that the land had been heretofore and was then occupied and worked as a coal mine?

A. I saw that it had been. There was nothing being done. This was on Sunday. I remember distinctly now it was on Sunday I was there, and there was nothing doing.

Q. 67. Well, with the exception that it was Sunday, and that on that account the day's labor was suspended, was there not mining then actively going on?

A. Yes; I should judge that it was.

Q. 68. Can you now remember what improvements, erections, or other appliances of mining you saw on the land?

A. I saw a blacksmith shop and some coal sheds at the mouth of a tunnel, and a tramway extending from there down to the other works on the adjoining land where the steam-engine and hoisting works were; the other mines.

Q. 69. Did you see to what proximity to these works on the land the railroad extending from the mines to the river was; did not the railroad run to the mines?

A. It did not run up to this mine. It ran up to the principal hoisting works, which, I believe, are on section 5.

Q. 70. What means, if any, were there for transporting coal from the openings on this land to the steam cars?

A. What I spoke of; the tramway.

Q. 71. Where did you stay in Nortonville; at the hotel?

A. Well, I didn't stay there at all.

Q. 72. Where did you put up your team?

A. Well, we put up the team at a little tavern somewhere near a big red building. I think it was a kind of a red brick store. The

company's store, I know since. Rather on the right-hand
159 side of the gulch that goes down toward the San Joaquin. A little place in there.

Q. 73. Did you make a pretty thorough examination of the ground at that time?

A. No; I could not say that I did; I went up to this tunnel.

Q. 74. Upon what did you base your estimate, in commencing your action of ejectment, that the company had taken from the land coal of the value of $1,300,000 prior to the date of your purchase?

A. I based that on information obtained from various sources and calculations based on that; that there had been so much superficial area of coal taken out of such a thickness.

Q. 75. Then that estimate of the value or of the extent of the waste committed by the Black Diamond Company was based on calculation, and was not a hazardous guess?

A. Oh, it was based on the best information I could get.

Q. 76. When next did you visit the land?

A. I visited it in company with the sheriff when I was put in possession.

Q. 77. About what date was that that you got into possession?

A. I think between two and three years ago. It was soon after the decree of the supreme court in my favor.

Q. 78. At the time you were put in possession by the sheriff how long did you remain there?

A. Probably two or three hours.

Q. 79. When next did you visit the land?

A. That I don't remember. I think I have been up there once since, possibly twice, but I could not be positive about that.

Q. 80. Except these visits that you have mentioned, have you ever been on the land?

A. No, sir.

Q. 81. You say it has been leased for grazing purposes; to whom?

A. To the butchers in Nortonville, Moore Brothers.

Q. 82. Is that a written lease or verbal?

A. It is a written lease. There was a lease made for one
160 year, and it has since been renewed; it runs on for another year.

Q. 83. Has any rent been paid under that lease?

A. Yes, sir.

Q. 84. How much?

A. Fifty dollars.

Q. 85. Fifty dollars a year?

A. Yes, sir.

Q. 86. Do you know to what extent cattle have been grazed by the tenants upon that property?

A. No, sir.

Q. 87. Do you know if they have had any cattle at all upon it?

A. I think they have from what they told me.

Q. 88. Is not the greater portion of this land so precipitous, rocky, barren, and destitute of soil as to be incapable of being put to agricultural uses?

A. No; I don't honestly think that the greater part of it is.

Q. 89. How much of it?

A. That I could not say. You mean including grazing?

Q. 90. No; that is not agricultural.

A. Oh, arable purposes?

Q. 91. Yes; agricultural.

A. That I don't know. I could not say. I should think there might be one hundred acres of it; perhaps not so much as that. I did not understand you before.

Q. 92. Have you ever known or heard of a crop being put in of anything?

A. No, sir; there is one place there, certainly, where grain could be cultivated, I think.

Q. 93. How many acres?

A. I don't know.

Q. 94. Not a great many, are there?

A. I should think that there might be in that field where the company used to keep their cattle for pasturage about 40 or 50 acres, perhaps more, and then up above that, on up to the section line, they can cultivate up there if there was any object in doing it; but it is like lots of other land up there; it would not pay to cultivate,
161 because it would cost more to raise the grain and get it to market than it would be worth. There is a great deal of land that could be cultivated, and is not cultivated, and is called valueless, because you could not make any profit out of it, but it is not because it could not be cultivated. I don't say that this is first-class land, and never did say so, but it is a poor lot of ground; but still, for foot hills, I got stuck with a lot that was worse once.

Q. 95. Since you obtained possession of the property by virtue of the writ of possession, issued in the action of ejectment, have you brought any other suit against the Black Diamond Coal Mining Company?

A. Yes, sir.

Q. 96. For what?

A. For coal removed during, or subsequent to, the time of the beginning of the first action.

Q. 97. And down to the time you got possession?

A. Yes.

Q. 98. How much did you claim in that action?

A. I claimed more in that, I believe, than I did in the other. I don't remember the amount now.

Q. 99. Do you remember the amount of damages?

A. I don't remember the exact amount, but it states there about $3,000,000.

Q. 100. Was that a conjecture or based upon the best information that you could get?

A. Based on the best information I could get. The first suit was, to the best of my knowledge and belief, and I have reason to believe since, that there had not been as much taken out then as there has been since; that I was misled in my information the first time. As to the difference in the two suits, I am perfectly willing to say this,

that the first time I claimed there had been so many tons taken out, and figured on a royalty. The second suit, I figured for the value of the coal. That is the reason it amounts to more.

Q. 101. What is the description, if you know, of the land
162 upon which the principal works of the Black Diamond Coal Mining Company are now situated. It is the north half of section 5, isn't it?

A. The south half.

Q. 102. The south half of section 5?

A. Yes.

Q. 103. The same township and range as your property?

A. Yes, sir.

Q. 104. Do you know the character of the south half of section 5 as to its mineral quality?

A. I believe there is coal underlying the whole of it, or pretty much the whole of it. I know a great deal more about that now than I did a few years ago.

Q. 105. Does Mr. Mullan still retain an interest in the land?

A. Yes, sir.

Q. 106. He has not sold or parted with the whole of his interest, to your knowledge?

A. No, sir.

Q. 107. Except the the two gentlemen you have named, are there any other persons interested with you in it?

A. No, sir; not that I know of.

Redirect examination by Mr. BROOKS:

Q. 1. At the time of your first visit, in whose company did you go?

A. In yours.

Q. 2. Did you not have a letter from the company to their agent at that place, and did he not accompany you in your visit to the ground?

A. I did; to the superintendent.

Q. 3. We staid somewhere that night. We passed the night there somewhere. Was it down at the wharf, at the landing; didn't we go up the next morning? Did I have my own horses?

A. Yes; I guess we did stay down at the landing. You took your ponies and the buggy. We went up on the boat, and I think
163 we stopped down on the river.

Q. 4. At the agent's house there?

A. No.

Q. 5. At the superintendent's?

A. Oh, we didn't sleep at the superintendent's?

Q. 6. I think we did.

A. Where; at the mine?

Q. 7. No; down at the landing.

Mr. BARNES: You went to the company's landing and staid over night, and drove up the next day?

A. I don't remember where we staid. Now, you speak of it, I

know we must have stayed at some place, and it must have been down there; but where we stayed I could not say. We got up there late in the evening.

Q. 8. Mr. BROOKS: It seems to me that we went up to the Cumberland shaft; the old Cumberland buildings and things.

A. I don't remember that we did. I don't think we did.

Q. 9. I never was there but once, and I remember those buildings.

A. I don't think we did. All that I remember going with the superintendent was after we came out of the mine we went up the hill back of his house, and walked around up there, and he pointed across to the ridge in which was the Black Diamond tunnel, and said that the boundaries were over there somewhere about such a place; and he took us round and showed us one or two stakes on the hill back of his house, and we looked down into the gulch, which, as I know now, comes round to where the old Cumberland works were. We looked down into that, but I don't think we went round over the ground any more than that. Then we came back. Wasn't it after we came back that we went to the engine-house, and the engineer in charge there let us down, and we went down into the Mount Hope shaft, one of the shafts there at the engine-house, and walked along there?

164 Q. 10. We went down, but I think we walked down. I don't think the machinery was running.

A. I think he had steam on, and we went down in the car. I think we did. Then we started—after we got down there—we went down this way into it and walked the gallery, and then we walked a little ways down some steps, a still farther descent; went along a little ways, and it was so dark and wet that we came out. We went along and we saw a steam engine down in the ground there. Steam was brought from the surface to supply it; and then he shewed us the tank where the water collected from which they pumped the water out of the mine, and he shewed us the stables where they kept the mules; and then we came out and went down and got our horses, and I bought a straw hat, and we drove down to Oakland, but I don't remember where it was; we did stop that night, but I think it was down at the landing. I don't think we stopped at a private house that night. I don't remember where it was we stayed that night; but we must have stopped at night, because we left in the afternoon at 4 o'clock.

Q. 11. We hitched our horses at Nortonville?

A. At a little shebang there, and then we went up to the agent's house. I think we went up to the agent's house.

Q. 12. I remember we went up on the ridge and he shewed us some stakes, and went around with us some time, and after he left us we continued exploring?

A. Yes, we continued around on that ridge there.

Q. 13. We went up that ridge up to the Cumberland shaft and houses?

A. Well, I don't remember that.

Q. 14. When we stood on the ridge he showed us across the ra-

vine where the other stake was, across up in the Chapparal.
165 What I want to get at is simply to what extent you explored the surface of this land there—to what extent you saw the surface of it on the occasion. Please to state to what extent on that first visit you saw the surface of the north half of section 8.

A. Well, I think I saw about one-half of it in looking across; probably I could see about one-half it; we went around over the north half; we went pretty well over the northeast quarter, I think.

Stipulation as to Copies, &c.

(It is hereby stipulated that the deposition may be closed, it being agreed that the copies of the documents referred to, which the witness is asked to produce, may be placed with the other documents and offered in evidence without being connected with the deposition, as also a memorandum statement by the witness as to dates and amounts paid John Mullan, and the same are to be considered part of the deposition, and used in evidence on the trial of the action, subject to such objections only as the originals would be subject to if offered.)

(Continued until Tuesday, June 15th, at eleven o'clock a. m).

TUESDAY, *June* 15, 1880.

Present: Mr. Barnes, of counsel for complainant; Mr. Brooks, of counsel for respondents.

Depositions—F. Barnard.

Examination-in-chief of FRANK BARNARD:

166 Q. 1. By Mr. BROOKS: What was your business on the 13th of May, 1865?

A. I was secretary of the Black Diamond Coal Co., and clerk of B. H. Ramsdell.

Q. 2. Do you know the north half of section 8, township 1 north, range 1 east, Mount Diablo meridian?

A. I have heard of it.

Q. 3. Do you remember that, at that date, you made an application to locate that piece of land?

A. Yes, sir.

Q. 4. At whose instance did you make that application?

A. By order of the board, the directors of the company, I believe; it is a long time ago; I can't place it in my mind.

Q. 5. For whose benefit was it done?

A. For the benefit of the company.

Q. 6. Was that tract of land occupied by you at the time?

(Objected to as irrelevant and immaterial.)

A. No.

Q. 7. Was it occupied by any other person except yourself?

A. I don't know, as I was in the office in San Francisco.

Q. 8. In the office in the city, were you?

A. Yes, sir.

Q. 9. Had you ever been on that half section to your knowledge?

(Objected to as irrelevant and immaterial.)

A. No.

Q. 10. Had you personally any interest in the occupation of that tract of land?

(Objected to as irrelevant and immaterial.)

A. No.

Q. 11. Did you pay any money for that location?

(Objected to as irrelevant and immaterial.)

A. No, sir.

Q. 12. Was there any money paid on that location?

(Objected to as irrelevant & immaterial.)

A. That I don't know.

Q. 13. Did you know anything about the east half of section 16, township 2 north, range 8 west, Mount Diablo meridian?

167 (Objected to as irrelevant & immaterial.)

A. No; I don't remember.

Q. 14. Who furnished the information upon which this application was based?

(Objected to as irrelevant & immaterial.)

A. I don't know; it is so long ago that really I can't remember. I don't remember the facts of the case.

Q. 15. Do you know who prepared the application?

(Objected to as irrelevant & immaterial.)

A. No; I don't recollect. I was only a machine; I did what they told me to do.

Q. 16. Did you present this to any officer—the application?

(Objected to as irrelevant & immaterial.)

A. I believe I did.

Q. 17. To whom?

(Objected to as irrelevant & immaterial.)

A. That I could not tell; it is a long time.

Q. 18. Did you know Leander Ransom, the State locator for the San Francisco land district?

(Objected to as irrelevant & immaterial.)

A. At that time I did.

Q. 19. Did you present your application or the affidavit to him?

(Objected to as irrelevant & immaterial, & that the document is the best evidence.)

A. I believe I did.

Q. 20. Did you know John F. Swift, the register of the land office?

(Objected to as irrelevant & immaterial.)

A. I knew him, but I was not aware he was in that office.

Q. 21. Did you make any application to him?

(Objected to as irrelevant & immaterial.)

A. That I can't tell; I can't bring it to my mind.

Q. 22. Did you know J. F. Hoffman, surveyor of the State of California, August, 1865?

(Objected to as irrelevant & immaterial.)

A. No, sir.

Q. 23. Did Leander Ransom prepare that application & furnish the information?

(Objected to as irrelevant & immaterial, & improper in form and leading.)

168 A. It is so long ago really I can't remember whether he did or not.

Q. 24. I understand you to say this was done by you, simply at the direction & request of the board of directors of the Black Diamond Coal Mining Co. & for their benefit?

(Objected to as irrelevant & immaterial.)

A. Yes, sir.

Q. 25. Had you any personal interest in the matter at all?

(Objected to as irrelevant and immaterial.)

A. No, sir.

Cross-examination:

Q. 1. (By Mr. BARNES:) When did you enter the service of the Black Diamond Coal Mining Co.?

A. I think 1862; I think the first.

Q. 2. How long did you continue with it?

A. Up to the time—7 or 8 years.

Q. 3. Where was the office of the company?

A. On Jackson St.—No. 213.

Q. 4. Did you have any coal yourself?

A. No; B. H. Ramsdell & A. G. Ramsdell were agents for them, selling coal on commission.

Q. 5. Where was their place?

A. On Jackson St.

Q. 6. Near your office?

A. In the same office.

Q. 7. Then the company had its office in the same building & office with the agents of the company?

A. Yes, sir.

Q. 8. The actual selling of the coal was done by the agents?

A. By the agents; yes.

Q. 9. Who brought the coal to town, and how did it come?

A. The company brought the coal to town. They employed schooners, and paid them so much a ton freight. It was turned over to Ramsdell, & he sold it & accounted for it & rendered account

sales, & bills were audited in the usual form by the finance committee.

Q. 10. How much coal was the company handling & selling
169 during the years you were there?

A. Really I could not remember.

Q. 11. Approximately?

A. Well, I could not state, because it is many years ago.

Q. 12. Hundreds or thousands of tons a month?

A. Thousands of tons a month.

Q. 13. Where did you understand this coal they sold came from?

(Objected to as secondary evidence.)

A. I knew where the coal came from—the Black Diamond mine; but from what opening. There were 2 bunkers, 2 tunnels. and the Black Diamond and Cumberland. It was all run into one coal-bunker, & brought to the schooner.

Q. 14. How was that coal sold—publicly sold, here in town?

A. Yes, sir.

Q. 15. Sold to jobbers & retailers?

A. Yes; retailers & anybody. Yes; they would retail, too. The way they used to do in the yard, we used to sell the coal to certain parties at wholesale on the wharf; to anybody that came after it. When we wanted it for our yard to retail we paid the same as outsiders paid for it.

Q. 16. Did the company have yards scattered around town?

A. No, sir; we assumed everything. If there was any coal on hand we bought it in on our own account.

Q. 17. Mr. BROOKES: What do you mean by "we?"

A. That is, the agent at that time; the agents.

Q. 18. Mr. BARNES: Were you employed by the agents in their business?

A. Yes, sir.

Q. 19. Then you were a clerk of Ramsdell?

A. I was a clerk of Ramsdell.

Q. 20. And also acted as secretary of the company?

A. Yes.

Q. 21. Did you ever go to the mines?

A. I used to go to the mine every month to pay off.

Q. 22. Did you see the openings there in the ground?

A. I saw them; that is all I did see.

170 Q. 23. Did you see the coal-bunkers?

A. Yes.

Q. 24. Did you see the houses where the miners lived?

A. Yes, sir.

Q. 25. And the store & tavern?

A. Yes, sir.

Q. 26. What kind of population was there during the time you went up there?

A. Well, it was coal mines, & little hotels down the valley; that is all.

Q. 27. The population was exclusively a mining population?

A. Yes, sir; a mining population.

Q. 28. How many men did they have there the time you were secretary & went over to pay off?

A. It would vary.

Q. 29. From what number to what number?

A. In the summer, 67 men; that included everything inside and outside the mine; and the winter, 150 to 175.

Q. 30. How was the coal got from the mines to the landing on the schooners?

A. Brought by teams—mule teams—under contract. They contracted with a man named Leander Sawyer. He brought it down from the bunker to New York.

Q. 31. On the San Joaquin river?

A. On the San Joaquin river.

Q. 32. And it was there delivered on board?

A. On board the schooners, & brought to San Francisco.

Q. 33. That was a regularly established and well-known business?

A. Yes, sir.

Q. 34. As any in this State?

A. As any in this State.

Q. 35. During those years was there any other place in this State from which coal was taken & publicly sold, except the coal taken & sold from the Black Diamond mine?

A. Yes, sir; there was coal brought from Oregon.

Q. 36. I mean this State?

A. Oh, in this State; not from the Black Diamond mine. There were 2 other mines up there besides—the Union mine and the Eureka mine; and then there was a shaft sunk by some Jews—Greenbaum & Newbauer.

Q. 37. Were these mines that you speak of in the neighborhood of the Black Diamond mine, on the same range?

A. Yes; on the same range.

171 Q. 38. But within a radius of how many miles do you think?

A. Three miles—2 or 3 miles; three miles, I guess. There is mountains like that (illustrates) and the Clark vein on the other side. We termed the other vein the Clark vein.

Q. 39. Was Ramsdell the agent for the other mines, as well as the Black Diamond?

A. No, sir.

Q. 40. They had separate yards & agencies, & sold separately?

A. Yes, sir.

Q. 41. You have been in the coal business ever since?

A. I have been in the coal business 28 years.

Q. 42. And are in it now?

A. And am in it now.

Q. 43. Did you ever go over that ground up there to any extent?

A. No; I used to go sometimes by Oakland when I had coin with me; sometimes by Antioch; but miners always knew about the time in the month I should arrive with money. For fear of having my

head taken off I took my precautions. The next morning I paid off, and next day took a team from Clayton down to Martinez.

Mr. BROOKS:

Q. 44. These mines do you know what section they were on?
A. Yes, sir.
Q. 45. Were any of them on 6 and 8?
A. No, sir; I don't know of any on section 8; no, in fact, I don't know.

Mr. BARNES:

Q. 45. You don't know where they were?
A. No.
Q. 46. There were 2 tunnels?
A. The Black Diamond tunnel & the Cumberland was a distance of nearly half a mile apart.
Q. 47. How far from the others you have nentioned?
A. Well, those were on the other side of the hill. I never went to the others at all.
Q. 48. Did any of these have yards?
A. They had no yards of their own; they only had their agents.
172 Q. 49. How many of them were supplying coal to the market?
A. Two.
Q. 50. What two?
A. The Eureka & Union mine.
Q. 51. Had there not been tunnels & shafts sunk & tunnels run in various places in the State for this kind of coal?
A. I have heard of them being run, but not of my own knowledge. I never was on the ground to see them.
Q. 52. Is there any other besides those you have mentioned that would produce any coal for the market besides the Black Diamond & the 2 you have mentioned?
A. Yes; they have brought in small lots; they have started tunnels & brought in one vessel. They would take 50 or 60 pounds & stop. There was the San Francisco coal mine, on the other side of the hill, they opened. Ramsdell opened that mine, & brought, perhaps, 100 tons of coal to the market & then stopped. The coal was inferior, & they stopped. Every now & then a man would start & bring out 40 or 50 tons & quit.
Q. 53. They would find some coal, but not to make it profitable to work?
A. Yes; all over that range, from Clayton up, you find veins from a foot to a foot & a half, all over that range.
Q. 54. Do you know anything about the Corral Hollow?
A. No, sir. I have seen the coal, though, brought to the market.
Q. 55. Did they work to any extent & profitably?
A. No; it was abandoned; it was only half formation; it was not coal.
Q. 56. Was any of it coal?
A. Yes; what they call lignite.

Depositions—P. Teare.

PHILIP TEARE examined by Mr. BROOKS:

Q. 1. What is you official position?

A. United States attorney of California.

Q. 2. This suit of the U. S. against Mullan & Avery do you know about it?

173 A. I know of the pendency of such a suit.

Q. 3. Under what authority or instructions was that suit commenced?

(Objected to as irrelevant, immaterial, & incompetent.)

A. It was by the direction of the attorney general, as I understand, from the records of the office.

Q. 4. Have you the record?

A. I have his letter addressed to Mr. Coghlan, who was U. S. attorney at the time, dated June 18, 1878, addressed to J. M. Coghlan, U. S. dist. att'y.

Q. 5. Do you know in whose interest this suit is commenced & prosecuted?

(Objected to as irrelevant & immaterial.)

A. I only know from the record of this letter & the general fact that there are parties claiming the land in controversy as coal land.

Q. 6. What parties?

(Objected to as irrelevant & immaterial.)

A. I understand the Black Diamond Co.

Q. 7. The Black Diamond Coal Mining Co.?

A. The Black Diamond Coal Mining Co.

Q. 8. Is there more than one letter & instructions in relation to this matter?

A. Not to my knowledge. This, of course, answers all purposes, for the purpose of carrying on this suit, until it is revoked. This letter applies to my acts as well as my predecessor, as far as managing the suit is concerned, until we have authority to dismiss it. The suit proceeds under the direction of the att'y general & that of the U. S. att'y.

Mr. BROOKS: I offer the letter in evidence.

Obj. Mr. BARNES: Counsel for the compl't objects to the admission of this letter in evidence, on the ground that it is not competent for the def't to inquire into the authority of the dist. att'y of this district

174 to bring or maintain this action, & that he can't be required to produce & disclose any instructions in respect to the litigation received by him from the Dep't of Justice at Washington, or any dep't of the U. S. Government.

I consent that the dist. att'y may, for the purpose of answering the interrogatory, read it, & the same may be taken down by the shorthand reporter, & may be used in evidence, if otherwise admissible, with the same force & effect as if the original or certified copy were offered in evidence.

A. I don't know as it is really proper for me to read this letter, notwithstanding the consent of counsel, because it is a privileged communication. The law strictly provides that any communication between the U. S. att'y and the attorney general is private.

After discussion, Mr. Brooks reads to the witness from the answer, pages 16 and 17, what purports to be a copy of the letter & instructions to Mr. Coghlan, late U. S. att'y of this district, dated June 18, 1878.)

A. That is an exact copy of the original.

(Counsel for the U. S. submits 4 documents furnished by Francis Avery, in response to the request of counsel, and desires that the same be marked by the examiner & annexed to the deposition.)

EXHIBITS D TO G.

(Said documents are marked respectively Complainant's Exhibits D, E, F, and G, Avery.)

Re-examination of FRANCIS AVERY:

Mr. BARNES: Just make your statement.

175 The WITNESS: In looking up the papers asked for by Gen'l Barnes I refreshed my memory about one thing that I was mistaken in regard to. My interest in this transaction connected with the north half of 8 was originally $\frac{1}{3}$, and it was afterwards increased to $\frac{1}{2}$.

In regard to my knowledge of the occupancy of the land by the Black Diamond Coal Company, my first knowledge of that was after I had sent the certificate of purchase to Sacramento & made application for the patent; and I think it was either the day or within one day before or after receiving the patent that I first learned that the Black Diamond Coal Co. was connected with this land.

I learned that by a message from Capt. Mullan, who told me that Leander Ransom had been to him to make inquiry about the certificate of purchase, which had been taken out in his name. He told him, Ransom, that he had sold & assigned this certificate to me, & he must apply to me. That was the first knowledge I had of the connection of the Black Diamond Coal Co. with this land and the way in which it came to my knowledge.

Q. 1. Did anybody call on you then?

A. Yes; I was called on on the part of the Black Diamond Co.

Q. 2. Who, do you remember?

A. I don't remember whether I saw Ransom or not. Mr. Cornwall came to see me once or twice, & I had some interviews also with Col. Barnes in relation to it. That is all, I believe.

I further certify that the said depositions were, by agreement of counsel for the respective parties in said cause, taken down in shorthand by S. C. Houghton, and after having been by him transcribed into their present form the reading of the said depositions to

176 the said witnesses and the signing thereof by them, respectively, were waived, and I have retained said depositions in

my possession for the purpose of presenting the same, with my own hand, to the court for which they were taken.

And I do further certify that I am not attorney nor of counsel for either or any of the parties to said action, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand, this 6th day of December, A. D. 1880.

JOS. F. O'BEIRNE, *Examiner.*

(Endorsed:) Testimony. Filed Dec'r 6th, A. D. 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

(Here follows diagram, marked p. 177.)

178 EXHIBIT "A" THOMPSON.

Field-notes endorsement: Field-notes of the subdivision lines of township 1 N., range 1 E., Mt. Diablo meridian, California, by George H. Thompson, deputy surveyor, under his contract of Feb'y 20th, 1864. Survey commenced Mar. 7th, 1864. Survey completed Mar. 9th, 1864.

Preliminary Oath of Assistants.

I, —— ——, do solemnly swear that I will well and truly perform the duties of compassman according to instructions given me, and to the best of my skill and ability.

—— ——.

Subscribed and sworn to before me, this — day of ———, 187–.

—— ——,

U. S. Deputy Surveyor.

We, W. U. Gage and W. W. Burr, do solemnly swear that we will faithfully execute the duties of chain-carriers; that we will level the chain upon uneven ground and plum the tally-pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

W. U. GAGE.

179 W. W. BURR.

Subscribed and sworn to before me this 7th day of Mar., 1864.

GEORGE H. THOMPSON,

U. S. Deputy Surveyor.

I, William W. Collins, do solemnly swear that I will well and truly perform the duties of axeman & flagman according to instructions given me, and to the best of my skill and ability.

WILLIAM W. COLLINS,

Axeman & Flagman.

Subscribed and sworn to before me this 7th day of Mar., 1864.

GEORGE H. THOMPSON,

U. S. Deputy Surveyor.

T. 1 N., R. 1 E., M. D. M.

Field-Notes of the Subdivision of the Northern Part of the T'p. 1 N., R. 1 E., M. D. M., as Surveyed by Geo. H. Thompson, Deputy Surveyor, under his Contract Dated Feb'y 20th, 1864.

The south portion of this t'p being a very rough & broken country, & the interested parties not wishing it subdivided, I commenced the survey at the cor. to secs. 7, 12, 13, & 18, on the E. B. of the t'p.

For the purpose of adjusting my instrument for the subdivision of this t'p, I run north from the cor. of secs. 7, 12, 13, & 18, on the E. B. of sec. 12, with a var. 16° 30′ E.

40.00. Post in md. ¼ sec. cor.

80.00. The cor. to secs. 1, 6, 7, & 12.

The proper adjustment of my instrument is therefore 16° 30′ E.

Surveyed commenced Mar. 7th, 1864.

180 From the cor. to secs. 7, 12, 13, & 18, I run west on a true line bet. secs. 12 & 13. Var., 16° 30′ E., over low chemisal hills.

40.00. Set post in md., and with pits, trenches, &c., as per instr., for ¼ sec. cor., from which—

A w. oak, 14 in. dia., b'rs N. 77¾° E., 158 l'ks.
" 16 " S. 14° E., 112 "

T. 1 N., R. 1 E., M. D. M.

The West Hartley Coal Mine brs. N. 60½ W.

Thence leaving chemisal & passing over rolling hills.

50.00. The West Hartley coal mine b'rs N. 10° W.

63.50. Enter thick chemisal.

80.00. Set post in md. with pits, trenches, &c., as per inst., for the cor. to secs. 11, 12, 13, & 14, from which the mouth of the tunnel of the Reese coal mine b'rs S. 1.30 ch's.

Land, low rolling hills.

Soil, 2d rate.

North, bet. secs. 11 & 12. Va., 16° 30′ E.

4.25. Deep gulch, co. N. E.

12.80. Sand rock bluff, 30 ft. high.

17.00. Top of hill & descend.

27.30. Ravine, co. N. E. & ascend.

39.00. Top of hill & descend.

40.00. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor., from which—

A w. oak, 10 in., b'rs S. 43° E., 41 l'ks.
" 24 " b'rs S. 8½° W. 112 "

47.70. Arroyo, co. east, & enter small valley.

181 56.00. Ascend high hill.

74.00. Top of ridge, trending E. & W., & descend.

80.00. Set post in m'd with pits, trenches, &c., as per inst., for the cor. to secs. 1, 2, 11, & 12, from which—

T. 1 N., R. 1 E., M. D. M.

A w. oak, 8 in. brs., S. 33¼° E., 248 lks.
Land, hilly.
Soil, 2d rate.

East, on a rand. line, bet. secs. 1 & 12. Va., 16° 30′ E.

40.00. Set post for temp. ¼ sec. cor.
78.50. Road from Marsh's Rancho to Antioch, co. N. & S. E.
80.60. Inter. the E. B. of the t'p, 71 lks. south of cor. to secs. 1, 6, 7, & 12, from which cor. I run west, on a true line, bet. secs. 1 & 12. Va., 17° E.
40.30. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor.
80.60. The cor. to secs. 1, 2, 11, & 12.
Land, rolling hills.
Soil, 2d rate.

North, on a rand. line, bet. secs. 1 & 2. Va., 16° 30′ E.

Descending hill.
12.50. Head of gulch, thence down through gulch & small stream.
40.00. Set post for temp. ¼ sec. cor. in small valley, ab't 5 ch's wide, thence over rolling hills.
80.37. Inter. the N. B. of t'p, 46 lks., west of cor. to secs. 182 1, 2, 35, & 36, from which cor. I run south, on a true line, bet. secs. 1 & 2. Va., 16° 10′ E.

T. 1 N., R. 1 E., M. D. M.

40.37. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor.
80.37. The cor. to secs. 1, 2, 11, & 12.
Land, rolling hills.
Soil, 2d rate.

From the cor. to secs. 11, 12, 13, & 14 I run west, on a true line, bet. secs. 11 & 14. Va., 16° 30′ E.

1.00. Leave chemisal brush.
3.50. Ravine, co. N. E. thence, crossing the spur of hill.
18.00. The head of ravine, co. S. E., & ascend hill.
26.00. Summit of low gap in hill, & descend.
27.50. To the head of dry ravine, thence down through same.
32.25. Leave ravine, brs. N. W.
40.00. Set ¼ sec. post in md. with pits, trenches, &c., as per inst.
45.00. Enter small valley, co. N. & S.
52.25. Arroyo, co. N.
55.00. Ascend hills.
80.00. Set post in md., &c., for cor. to secs. 10, 11, 14, & 15., from which—

A w. oak 13 in. brs. S. 39° W., 62 lks.
" l. " 10 " " N. 38° W., 108 "
" " " 10 " " N. 56° E., 63 "
" " " 9 " " S. 25° E., 67 "

Land, rolling hills.
Soil, 2d rate.

183 T. 1 N., R. 1 E., M. D. M.

North, bet. secs. 10 & 11. Va. 16° 30′ E.

Descending hill.
25.00. Enter small valley, co. E. & W.
32.50. Arroyo, co. E. & ascend hill.
40.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor. at the foot of sandstone bluff, 80 ft. high from which—
A l. oak, 10 in., b'rs S. 6½°, W. 66 l'ks.
" pine, 12 " " N. 7¾°, E. 62 "
Thence ascending sandstone bluff.
44.35. Top of bluff.
49.00. Deep gulch, co. E. & ascend main ridge.
66.25. Top of ridge, trending E. & W.
80.00. Set post in md., with pits, trench, &c., as per inst. for the cor. to secs. 2, 3, 10 & 11, from which—
A white oak, 6 in., b'rs N 65½°, E. 140 l'ks.
" " " 8 " " S. 55°, W. 234 "
Land, broken hills.
Soil, 3d rate.

East on a rand. line bet. secs. 2 & 11. Va. 16° 30′ E.

Along the north side of ridge.
40.00. Set post for temp., ¼ sec. cor.
80.12. Inter. N. & S. line 32 l'ks, north of cor. to secs. 1, 2, 11, & 12, from which cor. I run west on a true line bet. secs. 2 & 11. Va. 16° 16′ E.

T. 1 N., R. 1 E., M. D. M.

184 40.06. Set post in md. with pits, trenches, &c., as per inst. for ¼ sec. cor., from which—
A w. oak, 10 in., br's N. 1°, W 125 l'ks.
" " " 18 " " S. 12½°, E. 176 "
80.12. Cor. to secs. 2, 3, 10 & 11.
Land, rolling.
Soil, 2d rate.

North on a rand. line bet. secs. 2 & 3. Va. 16° 30′ E.

5.00. Enter small valley.
10.00. Ascend hill.
36.00. Summit of hill.
40.00. Set post on top of high hill for temp. ¼ sec. cor.; thence descending.
81.85. Inter. the N. B. of the t'p 83 l'ks west of cor. to secs. 2, 3, 34 & 35, from which cor. I run south on a true line bet. secs. 2 & 3. Va. 15° 54′ E.
41.85. Set post in md., with pits, trenches, &c., as per inst. for ¼ sec. cor.
81.85. The cor. to secs. 2, 3, 10 & 11.
Land, hilly.
Soil, 2d rate.

From the cor. to secs. 10, 11, 14 & 15 I ran west on a true line bet. secs. 10 & 15. Va. 16° 30′ E.

Along the north slope of a chemisal ridge, gradually ascending.

T. 1 N., R. 1 E., M. D. M.

28.00. Summit of ridge trending N. W. & S. E., & leave chemisal; thence down the south slope of ridge, gradually descending.

40.00. Set post in md. with pits, trenches, &c., as per inst.
185 for ¼ sec. cor. on the south slope of a hill.

65.00. Dry ravine, co. south, thence ascend Sugar Loaf peak.

71.50. Top of peak, thence descend.

79.10. Dry gulch, co. S. E.

80.00. Set post in md. with pits, trenches, &c. as per inst., for the cor. to secs. 9, 10, 15, & 16 on the side of hill.

Land, hilly & rocky.

Soil, 3d rate.

North, bet secs. 9 & 10. Var. 16° 30′ E.

2.20. Dry gulch, co. S. E. & ascend ridge.

12.50. Top of ridge, trending E. & W., thence descending through thick chemisal brush.

22.38. To the head of a ravine, thence down through same.

27.25. Leave ravine, bearing N. E.

32.50. Pass 1 chain east of Brown's house.

35.00. Enter Brown's corral.

37.00. Leave " "

40.00. Set post in md. with pits, trenches, &c., as per inst., from which—

T. 1 N., R. 1 E., M. D. M.

A w. oak, 20 in. brs., S. 20° E. 27 lks.
" " 16 " " N. 16° W. 180 "

43.00. Running stream, co. N. E., thence crossing small valley, co. E. & W.

52.00. Ascend steep hill.

63.00. Summit of hill & descend.

80.00. Set post in md. with pits, trenches, &c., as per inst., for the cor. to secs. 3, 4, 9, & 10, from which—

A l. oak, 8 in. brs., N. 8° W. 72 lks.
186 " ev. " 16 " " S. 83° E. 80 "

The mouth of the tunnel of the Pittsburg coal mine, brs. S. 59° W. 385 lks. dist.

Land, very hilly.

Fro Soil, 2d & 3d rate.

East on a rand. line bet. secs. 3 & 10. Va. 16° 30′ E.

3.5
).0(Crossing spur of hill, co. N. W. & S. E.
cor. 10.00. Dry ravine, thence up same.

22.00. To the head of small valley, thence ascend steep hill.

34.00. Top of hill & descend.

40.00. Set temp. ¼ sec. cor.
45.00. Stuart's old coal slope, 50 lks. south of line.
79.60. Inter. N. & S. line, 65 lks. south of cor. to secs. 2, 3, 10, & 11, from which cor. I run—

West on a true line, bet. secs. 3 & 10. Var. 16° 57′ E.

T. 1 N., R. 1 E, M. D. M.

39.80. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor. from which—
A w. oak, 18 in. brs., N. 23° W. 122 lks. dist.
" " " 8 " " S. 9° W. 264 " "
79.60. Cor. to secs 3. 4, 9, & 10.
Land, hilly.
Soil, 2d rate.

North on a rand. line, bet. secs. 3 & 4. Var. 60° 30′ E.

187 6.00. Ravine, co. west. Enter small valley & pass through the village of Summerville.
15.00. Road, co. S. E. & N. W.
20.00. Ascend hill.
40.00. Set post for temp. ¼ sec. cor.
83.40. Inter. the N. B. of t'p 54 lks. west of cor. to secs. 3, 4, 33, & 34, from which cor. I run south on a true line bet. secs. 3 & 4. Va. 16° 07′ E.
43.40. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor., from which—
A buckeye tree, 6 in. brs. S. 45° E. 75 lks.
" w. oak, 10 " " N. 40½ W. 119 lks.
83.40. Cor. to secs. 3, 4, 9, & 10.
Land, hilly.
Soil, 2d rate.

From the cor. to secs. 9, 10, 15, & 16, I run west on a true line bet. secs. 9 & 16. Var. 16° 30′ E.

T. 1 N., R. 1 E., M. D. M.

Ascending hill.
23.00. Top of hill, thence along on south side of same.
40.00. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor.
80.00. Set. post in md. with pits, trenches, &c., as per inst., for cor. to secs. 8, 9, 16 & 17.
Land, hilly.
Soil, 2d rate.
188 North, bet. secs. 8 & 9. Var. 16° 30′ E.
Over rolling hills.
40.00. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor., from which—
A l. oak 20 in. brs. N. 88° E. 32 lks.
" " " 8 " " N. 12½° W. 119 lks.
63.50. Deep gulch, co. N. W., & ascend spur of Chapparal hill.

80.00. Set post in md. with pits, trenches, &c., as per inst., for the cor. to secs. 4, 5, 8, & 9, on top of chapparal spur, trending N. W.
Land, rolling hills.
Soil, 2d rate.

East on a rand. line bet. secs. 4 & 9. Var. 16° 30′ E.

T. 1 N., R. 1 E., M. D. M.

Through dense chemisal brush.
30.00. Leave chemisal brush.
40.00. Set post for temp. ¼ sec. cor.
42.25. Pass about 30 lks. north of the coal mines air shaft.
48.50. Deep gulch, co. north.
63.00. " " " "
79.20. Inter. the N. & S. line at cor. to secs. 3, 4, 9, & 10, from which cor. I run west on a true line bet. secs. 4 & 9. Var. 16° 30′ E.
39.60. Set post in md. with pits, trenches, &c., as per inst., for ¼ sec. cor., from which a W. oak 14 in. brs. S. 1° W. 140 lks. dist.
79.20. Cor. to secs. 4, 5, 8, & 9.
Land, hilly & broken.
Soil, 3d rate.

189 North, on a rand. line bet. secs. 4 & 5. Va. 16° 30′ E.

Descending hill through dense chemisal brush.
6.00. Deep brushy gulch.
8.50. Board fence, co. E. & W.
13.00. Road from Clayton to Antioch, co. N. W. & S. E.
17.50. Ravine, co. E. & W.
24.30. Ravine, co. N. W. & ascend steep hill.
36.00. Top of hill.
40.00. Set post for temp. ¼ sec. cor.
42.00. Descend hill.

T. 1 N., R. 1 E., M. D. M.

60.00. Enter small valley, thence down through sand.
84.20. Inter. the N. B. of t'p 60 lks. west of cor. to secs. 4, 5, 32, & 33, from which cor. I run south on a true line bet. secs. 4 & 5. Va. 16° 04′ E.
44.20. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor.
84.20. The cor. to secs. 4, 5, 8 & 9.
Land, hilly.
Soil, 2d rate.
Mar. 8th, 1864.

From the cor., to secs. 8, 9, 16, & 17, I run west, on a true line, bet. secs. 8 & 17. Va., 16° 30′ E.

33.50. Top of high stony point.
40.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor.

80.00. Set post in md. of stone, with pits, trenches, &c., as per inst., for the cor. to secs. 7, 8, 17, & 18.

190 Land, rolling hills.
Soil, 2d rate.

North, bet. secs. 7 & 8. Va., 16° 30′ E.

Ascending ridge.
27.00. Top of ridge, thence long same.
37.75. Road from Clayton to Antioch.

T. 1 N., R. 1 E., M. D. M.

Co. N. E. & S. W.
40.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor. from which—
A W. oak 12 in. brs. N. 59½°, W. 150 lks.
" L. " 6 " " S. 83°, E. 198 lks.
42.50. Gulch, co. west.
45.00. Ascend rocky chemisal.
65.00. Top of chemisal ridge & descend through open ground on north side of ridge.
80.00. Set post in md., with pits, trenches, &c., as per inst., for cor. to secs. 5, 6, 7 & 8, from which—
A W. oak 3 ft. brs. S. 40, W. 345 lks.
" " " 30 in. " N. 45½, W. 248 lks.
Land, hilly.
Soid, 2d rate.

East, on a rand. line bet. secs. 5 & 8. Va., 16° 30′ E.

Ascending gradually the north slope of hill.
20.00. Descend into deep ravine.
22.80. Bottom of ravine, co. north, & ascend low ridge, thence along same.

191 25.00. Pass about 4 chs. north of the Cumberland Coal Mining Co.'s houses and improvements.

40.00. Set temp. ¼ sec. cor.
54.00. Descend abruptly a very steep hill.

T. 1 N., R. 1 E., M. D. M.

60.50. Road at the bottom of hill from Clayton to Antioch, co. N. E. & S. W.
61.50. Coal shed of the Black Diamond coal mine; the tunnel of mine about 2 chs. S. E., thence ascend rocky hill.
67.50. Summit of ridge, & descend into deep ravine.
74.00. Ascend through small chemisal.
80.80. Inter. N. & S. line 25 lks. north of cor. to secs. 4, 5, 8, & 9, from which cor. I run west on a true line bet. secs. 5 & 8. Va., 16° 20′ E.
40.40. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor., from which—
A W. oak, 14 in., brs. N. 65°, W. 98 lks.
" L. " 16 " " S. 40°, W. 93 "

80.80. The cor. to secs. 5, 6, 7, & 8.
Land, very broken.
Soil, 3d rate.

North on a rand. line bet. secs. 5 & 6. Va., 16° 30′ E.

14.50. Board fence, co. N. W. & S. E.
27.00. Small house, 45 lks. west of line.
27.50. Ravine, co. N. E.
40.00. Set temp. ¼ sec. post, thence ascend hill.
45.00. Top of hill, thence along on top of same.

T. 1 N., R. 1 E., M. D. M.

192 55.00. Descend gradually.
85.00. Inter. the N. B. of t'p 85 lks. west of cor. to secs. 5, 6, 31, & 32, from which cor. I run south on a true line bet. secs. 5 & 6. Va., 15° 54′ E.
45.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor., at the base of a steep hill.
85.00. Cor. to secs. 5, 6, 7, & 8.
Land, hilly.
Soil, 2d rate.

West on a true line bet. secs. 6 & 7. Va., 16° 30′ E.

Over low, rolling hills.
36.50. Board fence, co. N. & S.
40.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor.
76.30. Inter. the W. B. of the t'p 7.87 chs. south of cor. to secs. 1, 6, 7, & 12.
Set post at the point of intersection in md., with pits, trenches, &c., as per inst., for the cor. to secs. 6 & 7.
Land, rolling hills.
Soil, 2d rate.

From the cor. to secs. 7, 8, 17, & 18, I run west on a rand. line bet. secs. 7 & 18. Var., 16° 30′ E.

T. 1 N., R. 1 E., M. D. M.

Over low, rolling hills.
36.00. Arroyo, co. N. W.
36.50. Road from Clayton, co. N. W. & S. E., & ascend hill.
193 40.00. Set post for temp. ¼ sec. cor.
53.50. Ravine, co. north.
63.50. " " "
76.00. Inter. the W. B. of t'p 8, 64 chs. south of cor. to secs. 7, 12, 13, & 18, & 80.24 chs. south of the cor. which I established to secs. 6 & 7. Set post in md., with pits, trenches, &c., 24 lks. north of the point of intersection for the cor. to secs. 7 & 18, from which I run east on a true line, bet. secs. 7 & 18. Va., 16° 20′ E.

36.00. Set post in md., with pits, trenches, &c., as per inst., for ¼ sec. cor., from which—
A w. oak 6 in. brs. S. 67½°, W. 34 lks.
" " " 8 " " N. 47½°, W. 34 "
76.00. Cor. to secs. 7, 8, 17, & 18.
Land, rolling timbered hills.
Soil, 2d rate.
Survey completed Mar. 9th, 1864.

General Description.

The land in the t'p is quite broken, though the soil is naturally rich & large portion of it susceptible of cultivation.
The south part of the t'p is occupied by Mount Diablo, which is very rugged & broken, which renders it unfit for cultivation. The north part, which is subdivided, is thickly settled, & is considered very valuable on account of the large deposits of coal which it contains. It is well watered, & has on it an abundance of timber, mostly oak.

List of Names.

194 A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing field-notes of ———, shewing the respective capacities in which they acted.

—— ——, compassman.
—— ——, chainman.
—— ——, chainman.
—— ——, axeman.

Final Oaths of Assistants.

We hereby certify that we assisted George H. Thompson, deputy surveyor, in surveying T. 1 N., R. 1 E., M. D. M., and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the surveyor general.

W. U. GAGE, *Chainman.*
W. W. BURR, *Chainman.*
WM. W. COLLINS,
Axeman & Flagman.

Subscribed and sworn to before me, this 9th day of Mar., 1864.

G. H. THOMPSON,
U. S. Deputy Surveyor.

Final Oath of Deputy Surveyor.

I, George H. Thompson, deputy surveyor, do solemnly swear that in pursuance of a contract with E. F. Beale, United States surveyor general for California, bearing date the 20th day of Feb'y, 1864, I have, well, faithfully, and truly, in my own proper person, and in

strict conformity with the instructions furnished by the surveyor general, the surveying manual, and the laws of the United States, surveyed all those parts or portions of subdivision T. 1 N., R. 1 E., M. D. M., as are represented in the foregoing field-notes as having been surveyed by me and under my directions; and I do further solemnly swear that all the corners of said surveys have been
195 established and perpetuated in strict accordance with the surveying manual and printed instructions, and that the foregoing are the true and original field-notes of each survey.

GEORGE H. THOMPSON,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 23d day of Mar., 1864.

W. V. PARKER,
Notary Public.

Approval of Field-Notes.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *Mar. 28th*, 1864.

The foregoing field-notes of the surveys of north boundary & subdivision lines of T. 1 N., R. 1 E., Mt. Diablo meridian, in the State of California, executed by George H. Thompson, U. S. deputy surveyor, under his contract dated Feb'y 20th, 1864, having been critically examined, and the necessary corrections and explanations made, the said field-notes and the surveys they described are hereby approved.

E. F. BEALE,
U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *March 25th*, 1879.

I, Theo. Wagner, U. S. surveyor general for California, do hereby certify that the foregoing transcript has been correctly copied from the original field-notes, as the same remain of record and on file in this office.

Attest my hand and official seal the day and date hereinabove written.

[Seal of Land Office, San F'sco.]

THEO. WAGNER,
U. S. Surveyor General for California.

(Here follows diagram, marked p. 196.)

197 COMPL'NT'S EX. "C"—AVERY.

"M'ch 27, 1871. The N. ½ sec. 8, T. 1 N., R. 1 E. See agreement with Mullan, $1,000."

COMPL'NT'S EXHIBITS "F"—AVERY.

Copy.

For and in consideration of one thousand (1,000) dollars, gold

coin, loaned me by Francis Avery this day, I hereby agree to and with the said Avery that he shall be entitled to and shall receive and retain from proceeds of the sale of the north half of section 8, in town. 1 north, range 1 east, Mt. Diablo meridian, after repayment to himself of the said sum of one thousand dollars, with interest, one-sixth of the amount for which said half section of land may be sold, and in the meantime have assigned to him the State certificate of purchase for the above land in order that the patent for same may be issued to and held by him as collateral security to this agreement.

San Francisco, March 28th, 1871.

JOHN MULLAN.

Modified in June, 1871, to share equally the proceeds—each one calling it square as to moneys paid out hitherto.

Each one to have half after payment of contingent fee to B. S. Brooks of 10%.

COMPL'NT'S EXHIBIT "D"—AVERY.

Copy.

Know all men by these presents that I, John Mullan, of the city and county of San Francisco, in the State of California, do-
198 ing business as a real estate agent at No. 712 Montgomery street, in said city, for and in consideration of the sum of one dollar in gold coin of the United States of America, to me in hand paid by Francis Avery, formerly of Cincinnati, Ohio, and New York city, now presently residing at No. 717 Post street, in the city of San Francisco aforesaid, the receipt of which sum is hereby acknowledged, and for divers other good causes and considerations me thereunto moving, have bargained, sold, assigned, transferred, and set over, and by these presents do bargain, sell, assign, transfer, and set over, unto the said Francis Avery and his legal representatives all and every right or cause of action which I now have, or hereafter may or ought to have, against the Black Diamond Coal Company, or any other company or person or persons, for or because of or on account of any waste or injury committed upon the north half of section eight (8), in township one (1) north, range one (1) east, Mt. Diablo base and meridian, according to the United States survey, situate in the county of Contra Costa and State of California, or for or because of or on account of the taking of coal therefrom, or the taking of the rents, issues, profits, or espleas thereof, and any right or cause of action for mesne profits which I may now have or hereafter be entitled to, in respect to said land above described, against any person or persons, company or companies, body or bodies corporate, or otherwise whatever.

To have and to hold the above bargained, sold, assigned, and transferred rights, privileges, demands, and cause or causes of action above recited, as also the above-described premises, to the said Francis Avery and his legal representatives, for his and their sole use and benefit forever.

In witness whereof I have hereunto set my hand and seal, at the said city of San Francisco, this twenty-eighth (28th) day of March, A. D, one thousand eight hundred and seventy-one.

[$1.00 Int. Rev. Stamp. Cancelled.]
[50c. Int. Rev. Stamp. Cancelled.]

JOHM MULLAN [SEAL.]

199 COMPL'N'TS' EXHIBIT "E"—AVERY.

Copy.

Declaration of trust made and declared at the city of San Francisco on the third day of August, A. D. 1871, between Francis Avery, of the city and county of San Francisco, party of the first part; John Mullan, of the same place, party of the second part, and Benjamin S. Brooks, of the same place, party of the third part.

Whereas the State of California, by letters patent, under the seal of the said State, on the sixth day of April, A. D. 1871, granted and conveyed to the party hereto of the first part a certain tract of land situate, lying, and being in the county of Contra Costa, in said State of California, known and distinguished as the north half of section eight (8), in township number one (1) north, in range number one (1) east, from the Mt. Diablo meridian, which patent is founded on a certificate of purchase granted by the said State to the party hereto of the second part, on the twenty-first (21st) day of May, A. D. 1869, and numbered 1935;

And whereas the parties hereto are jointly interested in the said land, and desire, by this instrument, to declare their equitable rights and interests:

Therefore it is hereby declared that they are the rightful owners of the said land and of the rents, issues, and profits thereof, and of all claims and demands, of what nature or kind soever, against any and all persons, natural or corporations, whether for trespasses or waste committed thereon, or damages for the detention thereof, or any other matter or thing pertaining to said land or growing out of the same or the said certificate of purchsse or patent, in the following proportions, to wit:

To the said party of the first part, nine (9) twentieths (20ths).

To the said party of the second part, nine (9) twentieths (20ths).

To the said party of the third part, two (2) twentieths (20ths).

And it is farther declared that the said legal title and the said several claims and causes of action are vested in the said party of the first part hereto in trust, to and for the use, benefit, and
200 behoof of the parties to this instrument, in the proportions hereinbefore specified.

In witness whereof the parties to this instrument have hereunto interchangeably set their hands and seals, the day and year first above written.

FRANCIS AVERY. [SEAL.]
JOHN MULLAN. [SEAL.]
B. S. BROOKS. [SEAL.]

COMPL'N'TS' EXHIBIT "G"—AVERY.

Copy.

Agreement made and entered into at the city of San Francisco, California, this fifteenth day of March, A. D. one thousand eight hundred and seventy-seven, between Francis Avery and John Mullan, both of the said city of San Francisco, parties hereto of the first part, and Cornelius T. Cutler, of Martinez, Contra Costa county, California, party hereto of the second part.

Whereas the parties of the first part are jointly interested in a certain tract of land in Contra Costa county, California, held in the name of the said Francis Avery, and known and described as the north half of section eight (8) in township one (1) north, range one (1) east, Mt. Diablo base line and meridian;

And whereas The Black Diamond Coal Mining Company, by its agents and employees, or other persons, have been taking and removing large amounts of coal from the said land since it became the property of the said parties of the first part, and are now still continuing so to do, to the loss and injury of the parties of the first part, who desire to ascertain the amount of coal so taken and removed, that a suit or suits may be instituted to recover the value thereof, with damages for trespass and waste committed on and detention of said land;

And whereas the said party of the second part is in a position, by reason of his knowledge of these matters and of his acquaint-
201 ance and relations with various persons, to obtain evidence and proofs of the amount of coal taken and removed from the said land:

Now this agreement witnesseth: That the party of the second part hereby agrees to furnish to the parties of the first part proofs and legal evidence of the amount of coal taken and removed from said land by the Black Diamond Coal Mining Company, and by persons acting under its authority and permission, from the "Black Diamond Bed," the "Clark Bed," and the "Little Vein," on the said tract, the north half of section eight, town. one north, range one east, Mt. Diablo meridian.

And to give the names and addresses of and to produce witnesses who can of their own knowledge swear to and prove the said taking and removal of coal and the amount so taken since August tenth, A. D. 1871, as nearly as the same can be ascertained.

In consideration of such legal evidence, and proofs so to be furnished by the party hereto of the second part, the parties hereto of the first part do hereby agree and bind themselves, their heirs and assigns, to account for and pay over to the said party of the second part, or to his heirs and assigns, five (5) per cent. of the amount or amounts which may be realized under or from any judgment or judgments obtained against the Black Diamond Coal Mining Company, or any or all of its stockholders or other person or persons, for trespass or waste committed on, or damages to or damages for the detention of, the said land.

And in the case of a compromise or compromises, or settlement or settlements, being made with the said Black Diamond Coal Mining Company, or other person or persons, either before or after the commencing of any suit or suits against it or them, or any of them, by the said Francis Avery, in whose name this business is to be conducted, it is expressly agreed and understood that the parties hereto of the first part shall account for and pay over to the party of
202 the second part five (5) per cent. of the amount or amounts so realized.

In witness whereof the parties hereto have hereunto set their hands and seals, the day and year first hereinabove written.

Done in triplicate.

FRANCIS AVERY.
JOHN MULLAN.
C. T. CUTLER.

SAN FRANCISCO, CALIFORNIA, *May 4th*, 1877.

For value received I hereby assign, transfer, and set over to Henry Manwaring one full half interest in the within contract, and I do hereby authorize and empower him to collect and receive directly or to his order one full half of any and all money or monies or other valuable thing or things which may become due at any time under this contract to me and through me to him.

And I further authorize, empower, and direct Francis Avery especially, and both of the parties of the first part to the above contract, to account for and pay over directly to my assignee, Henry Manwaring, or to his order, the said one-half of all money or monies which may accrue and become due under any and all of the provisions and conditions of this contract.

In witness whereof I have hereunto set my hand and seal, the day and year and place first above written in this assignment.

C. T. CUTLER.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss*:

On this eleventh day of May, A. D. one thousand eight hundred and seventy-seven, before me, James D. Craig, a notary public in and for said city and county, duly commissioned and sworn, personally appeared C. T. Cutler, personally known to me
203 to be the same person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office, in the city and county of San Francisco, the day and year in this certificate first above written.

[J. D. Craig's notarial seal.]

JAMES D. CRAIG,
Notary Public.

Copy.

SAN FRANCISCO, CALA., *May 20th*, 1878.

For and in consideration of the sum of seventy-five dollars to me in hand paid by Henry Manwaring in gold coin of the United States of America, and the receipt whereof is hereby acknowledged, I hereby sell, assign, transfer, and set over to Henry Manwaring and his legal representatives all my rights and interest in and under the within contract, and in and to the issues and profits thereof.

In witness whereof I have hereunto set my hand and seal, the day and year first above written.

(Signed) C. T. CUTLER.

Acknowledged before F. O. Wegener, a notary public in and for the city & county of San Francisco, on May 20th, 1878.

204 *Stipulation as to Printed Copies.*

Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES, Plaintiff, *vs.* JOHN MULLAN *et al.*, Defendants.

It is stipulated and agreed that all or any of the copies of the documents as printed in the joint trascript on appeal in the supreme court of the State of California, in the case of Francis Avery *vs.* The Black Diamond Coal Mining Co., may be offerred in evidence by either party on the hearing hereof, with the same force and effect as the originals or certified copies, and subject to the same objections as the originals might be if presented, except as to the time and place.

San Francisco, Jan'y 27, 1881.

W. H. L. BARNES,
Counsel for Plaintiff.
CHARLES DEVENS,
Att'y General.
By PHILIP TEARE,
U. S. Att'y for the Plaintiff.
B. S. BROOKS,
Sol'r for Def'ts.

(Endorsed:) Filed January 29, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'py cl'k.

205 *Correspondence of Land Dep't. Stipulation.*

In the U. S. Circuit Court, District of California.

THE UNITED STATES *vs.* JOHN MULLAN *et als.*

It having been stipulated that the correspondence with the Land Department in regard to the matters alleged in the bill should be put in evidince, and the copy filed being imperfect, it is consented that the annexed shall be read in evidence in place of the originals, under

the terms of the said stipulation, with the like effect and no other that the originals would have.

PHILIP TEARE,
U. S. Attorney for the Attorney General, Sol'r for Complainant.
W. H. L. BARNES,
Sol'r for Complainant.
B. S. BROOKS,
Sol'r for Def'ts.

206 *Copies of Correspondence with the Land Dep't and Stipulations as to Same.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 4, 1871.

Messrs. Britton & Gray, Washington, D. C.

GENTLEMEN: Referring to your letter of 2nd inst., wherein you request to be advised as to the present status of the N. ½ of sec. 8, T. 1 N., R. 1 E., Mt. Diablo Mer., as shown by our records, I have to state that the tract described stands on the records of this office as having been confirmed to the State of California under act of 23rd July, 1866, and approved Jan'y 3, 1871, as indemnity for the E. ½ sec. 16, T. 2 N., R. 8 W., and that the title of the State to the above land appears to be valid and clear.

Very respectfully, your ob't serv't,
WILLIS DRUMMOND, *Commisioner.*

(At the head of this letter in red ink:) "This letter was not transmitted to Messrs. B. & G. for reasons given on next page."

207 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 6, 1871.

His Excellency the Governor of California, Sacramento, Cal.

SIR: In list No. 19 of California school indemnity selections, approved Jan. 3, 1871, there was inadvertently included the following tract, viz: N. ½ sec. 8, t'p 1 N., R. 1 E., selected June 25, 1865, as indemnity for the E. ½ sec. 16, t'p 2 N., R. 8 W., R. & R., No. 345.

That the said tract was erroneously certified to the State is clearly shewn by our records, from an examination of which it appears—

1st. That the said N. ½ 8, 1 N., 1 E., was at the date of said selection double minimum land, the odd sections of the township 1 N., 1 E., having been withdrawn for the C. P. R. R. Jan. 30, 1865, nearly six months prior to the date of the State selection.

2d. That the State had prior to the date of the approval of the said N. ½ of sec. 8, 1 N., 1 E., selected other lands as indemnity for the said E. ½ 16, 2 N., 8 W., thereby acknowledging the invalidity of the first selection, viz: N. ½ of N. E. ¼ & N. ½ of N. W. ¼ sec. 2, T. 26 S., R. 13 E., selected Oct. 2, 1869, in lieu of the N. E. ¼ sec. 16, 2 N., 8 W., R. & R., 2378, and W. ½ of S. E. ¼ sec. 4 and N. W. of N. E. & N. E. of N. W. sec. 9, t'p 26 S., R. 12 E., selected Dec.

31, 1869, in lieu of the S. E. ¼ sec. 16, 2 N., R. 8 W., R. & R., No. 2459.

The first of the above selections was approved to the State Aug. 10, 1870, six months prior to the date of the approval of the said N. ½ 8, 1 N., 1 E.

3d. That the said N. ½ 8, 1 N., 1 E., was coal land, so noted on the plats of survey on file in this office, and therefore was not subject to selection by the State, having been reserved by the act under which the said selections are made.

208 The certifying of the said N. ½ 8, 1 N., 1 E., was therefore, in view of the above facts, clearly an error, and in order that this error may be corrected, and as the said tract was approved, "subject to any valid interfering rights which may have existed at the date of selection," I have the honor to request that you will on the part of the State of California relinquish to the U. S. the said N. ½ of sec. 8, t'p 1 N., R. 1 E., and, if a patent has been issued by the State, that the same be recalled and revoked, that the tract may be restored to the body of the public lands, and the rights of all parties protected.

I am, sir, very respectfully, your ob't serv't,

WILLIS DRUMMOND, *Commissioner.*

209 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., 24*th Nov.*, 1871.

Messrs. Britton & Gray, Washington, D. C.

GENTLEMEN: Referring to your letter of the 1st inst., asking a suspension of action in the case of the State selection of N. ½ sec. 8, T. 1 N., R. 1 E., which, it is claimed, was erroneously certified to the State of California, to allow all parties in interest to make their showing in a formal manner, I have to state that your request has been granted, and a suspension of all further action in the above case has been ordered for the period of sixty days from date, and the parties so advised.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

210 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., 24*th Nov.*, 1871.

W. H. L. Barnes, San Francisco, California.

SIR: Referring to the matter of the State selection of the N. ½ sec. 8, T. 1 N., R. 1 E., Mt. Diablo meridian, which, it is claimed, was erroneously certified to the State, and which this office, under date of the 6th Sept. last, requested the Governor of California to relinquish on the part of said State, I have to inform you that we are in receipt of a communication from that officer, in which he declines to relinquish, (leaving the) matter entirely with this Department, and application having been made to this office for a suspen-

sion of further action in the case to allow all parties in interest to make their showing in a formal manner, the said application has been granted, and all further action is hereby suspended for the period of sixty days.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

211 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *24th Nov.*, 1871.

Hls Excellency the Governor of California, Sacramento, California.

SIR: Referring to the matter of the State selection of the N. ½ sec. 8, T. 1 N., R. 1 E., which, it is claimed, was erroneously certified to the State in List No. 19 of school indemnity selections, I have the honor to state that a suspension of all further action in the above case for the period of sixty days from date has been granted on application to allow all parties in interest to make their shewing in a formal manner, and the parties have been so advised.

I am, sir, very respectfully, your ob't serv't,
WILLIS DRUMMOND,
Commissioner.

212 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 14, 1872.

His Excellency the Governor of California, Sacramento, Cala.

SIR: Referring to our letter of Sept. 6, 1871, to your predecessor in office, requesting him to relinquish the N. ½ sec. 8, t'p 1 N., R. 1 E., supposed to have been erroneously certified to the State in list No. 19 of school indemnity selections, approved Jan'y 3, 1871, I have now to state that from a further examination of the case it is found that the allegation of facts as set forth in that letter were erroneous, and that there now appears to be no valid grounds for interfence on the part of this office in the case. I have, therefore, to request that you will return the letter above referred to to this office, as the request therein contained is hereby withdrawn, and all action by this office as against the title of the claimant under the State subsequent to the certification of the tract is hereby rescinded.

I have the honor to be, very respectfully, your ob't serv't,
WILLIS DRUMMOND,
Commissioner.

213 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 15, 1872.

Francis Avery, Esq'r, San Francisco, California.

SIR: Referring to your communication of Dec. 23, 1871, filed in this office by Messrs. Britton & Gray, in relation to the N. ½ sec. 8, T. 1 N., R. 1 E., approved to the State of California Jan'y 3, 1871, in list No. 19, I herewith enclose a copy of our letter addressed to

the Governor of the State, which will explain the action of this office in the premises.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

214 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 15, 1872.

Britton & Gray, Washington, D. C.

GENTLEMEN: Referring to your letter of Jan'y 23rd ult., enclosing sundry arguments by Francis Avery relative to the N. ½ sec. 8, T. 1 N., R. 1 E., approved to the State of California Jan'y 3, 1871, in list No. 19, I have to inform you that I have this day requested the Governor of California to return our letter of Sept. 6, 1871, asking him to relinquish the above-named tract, and have ordered the case to be finally dismissed from our docket. I have advised Mr. Avery of the above action per letter of this date.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

215 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 18, 1872.

W. H. L. Barnes, Esq'r, San Francisco, California.

SIR: Referring to your telegram bearing date the 13th inst., received at this office the 14th, requesting a further stay of proceedings in the matter of the N. ½ sec. 8, T. 1 N., R. 1 E., certified to the State in list No. 19, approved Jan'y 3, 1871, I have to state that owing to the fact that this office had, prior to the reception of your dispatch referred to, finally disposed of the case by requesting the Governor of the State to return our letter of Sept. 6, 1871, asking the relinquishment of the said tract, and advised him that all further proceedings by this office as against the State's title would be dismissed from that date, I must decline to consider your request, or to take any further action in the case.

In explanation of the above decision on the part of this office I would state that after a careful examination of the testimony on file in this office, and also of the statutes, rules, and regulations governing such cases, I am satisfied that no other decision could properly be rendered in the case than that above cited.

If the parties you represent were shewn to be actual *bona fide* settlers under the law, it might be in the power of this office to grant some relief by issuing a patent, and thus enabling the parties
216 in interest to take the case into the court for a decision as to the validity of their respective claims; but you have no standing in the case whatever.

Your filings have expired by limitation of law, and no valid claimant appearing, the case is reduced simply to one of the United States *vs.* The State of California.

Again, from a further examination of the evidence on which the statements in our letter of Sept. 6, 1871, were based, it is found that the allegation of facts as set forth in that letter were erroneous; as, for instance, it was claimed in the letter referred to that the State had received indemnity for the same land twice, when it is found that the selection approved to the State in list No. 17 had been cancelled prior to the date of such approval by substituting other land in lieu of the E. ½ sec. 16, T. 2 N., R 8 W., embraced in the first selection.

Also that the State had abandoned another claim conflicting with the selection of N. ½ sec. 8, 1 N., 1 E., thus leaving it free free from any conflict with other State selections.

In view of the above facts I must decline any further consideration of this case.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND, *Commissioner.*

217

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 11, 1872.

Register and Receiver, San Francisco, Cal.

GENTLEMEN: I herewith enclose a copy of our letter addressed to the Governor of California, under date of the 14th ult., requesting the return of the letter from this office of Sept. 6, 1871, and advising him that all further action by this office as against the title of the claimant under the State law to the tract in question was thereby rescinded.

You will make the necessary annotations on your records showing the above action, and thereafter advise this office.

Very respectfully your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

(Endorsed:) Copies of correspondence with Land Department and stipulation in regard thereto. Filed April 4th, A. D. 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

218

Syllabus.

In the Circuit Court of the United States, Ninth Circuit, District of California.

UNITED STATES *vs.* JOHN MULLAN *et al.*

1. Known mines, coal.—Whatever may have been originally the proper construction of the word "mines," as used in the preemption act of 1841 (5 Stat., 456), the act of July 1, 1864 (13 Stat., 343), gave a legislative construction to the term, which thenceforth attached to all known "coal-beds or coal-fields," in which no interest had before become vested, and withdraw such coal lands from the operation of all other acts of Congress.
2. School and coal lands.—After July 1, 1864, known coal lands were

not subject to selection by the State in lieu of sections 16 and 36 for school purposes, and the Secretary of the Interior had no authority to list such lands to the State on such selections.

3. Patent vacated.—Where the State selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the State by the Secretary of the Interior, and by the State thereupon patented to private parties, a court of equity upon a bill filed by the United States will annul the selection, listing over a patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the State to select or the Secretary of the Interior to list over.

4. Bill filed by Attorney General.—Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the Attorney General of the United States, subscribed by his authority, the court is authorized to entertain the bill.

219 5. Vested rights. The State has no indefeasable vested right to select lands in lieu of sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, Congress may withdraw any lands from the operation of laws permitting their selection.

Decision.

SAWYER, *Circuit Judge:*

This is a bill in equity to vacate a State selection, a listing to the State by the Secretary of the Interior, and a patent issued by the State, in pursuance thereof, to the north half of section eight, T. 1 N., R. 1 E., Mt. Diablo meridian, the said tract having been selected by, and listed to, the State as school lands in lieu of a half section of one of the sections sixteen, which was for some lawful reason unavailable to the State. The claim is that, at the time of the selection, listing, and issuing of the patent in question the land was known coal lands, not subject to selection in lieu of school lands, and that the listing over to the State and issuing of the patent were by fraud, or mistake, or error in law—at all events, without authority and unlawful.

The facts, as clearly shown by the uncontradicted evidence, are that the Black Diamond Coal Compay took possession of this half section of land as early as 1861, and, from that time until after the patent issued, in 1871, continued in the possession of said land, working a coal mine upon it. It had tunnels, drifts, hoisting works, and other machinery, coal-bunkers of large capacity, etc., on it, costing many thousands of dollars, and had constructed a railroad operated by steam to transport its coal to New York landing on the bay, some twelve miles distant, whence it was shipped to market. There was also a mining town built upon the land in question, occupied at different times by from several hundred to over a thousand

inhabitants, all engaged in coal mining on this and adjacent
220 lands, or in some way connected with the mining interests, there being no other occasion for a town at that point, and no other occupation for its inhabitants. The lands were situated on the side of Mount Diablo at an elevated point, the surface rough and broken, of no use for agricultural purposes, and of inconsiderable utility even for pasturing, and of but trifling value for any purpose whatever other than for the coal mines situated and worked thereon.

The lands were surveyed and sectionized in March, 1864, the surveyor professing to proceed under the act of 1853. The land was indicated on the plats and surveys as coal land. The land was selected as school land at the instance of one Frank Barnard, and at his suggestion, and ostensibly for his use, located by Leander Ransom, State locating agent, on June 25, 1865. It was selected at the suggestion and doubtless for the real benefit of the Black Diamond Coal Company, which was at that time in occupation. But neither Barnard nor the company took measuress to perfect the title. On August 28, 1868, the defendant Mullan, while the Black Diamond Coal Company was actually in possession working the coal mine both, as is admitted in the answer and shown by the proofs, applied to Jno. W. Bost, surveyor general of California, to purchase the land from the State, as having been selected by the State as school land, in lieu of a corresponding half of a section 16 not available. The surveyor general objected that is was coal land and not subject to selection; but said Mullan insisted that it was subject to selection, and that the selection had been approved by the register of the land office; that he was entitled to purchase, having offerred to comply with the State law upon the subject, and that, if the surveyor general should refuse to permit a purchase, he could compel him to do so by mandamus. Whereupon, on August 25, 1868, the surveyor general accepted the application to purchase. On April 27, 1869, he certified the section to the United States land office, and on May 21, 1869, he issued a certificate of purchase to Mul-
221 lan. On Jan'y 3, 1871, the Secretary of the Interior listed the land to the State "subject to any interfering rights that may exist to them." On March 28, 1871, Mullan assigned his rights to defendant Avery, but, as testified by Avery, he still retains an interest in the land. On the same day Mullan also assigned to Avery any and all right to any claim which had accrued to him against the Black Diamond Coal Company for damages resulting from working the coal mine, and taking out coal since the issue to him of a certificate of purchase, upon which assignment Avery not long afterwards sued the said company, claiming one million three hundred thousand dollars damages for coal taken out of the land. Avery denies that he knew that the Black Diamond coal mine was on the land at the time he acquired his interest, but admits that Mullan told him that it was in the neighborhood of coal and that there might be coal on it. Mullan also states that he never saw the land before his purchase from the State.

The selection was made by the State, as is claimed, in pursuance

of the act of Congress of March 3, 1853, extending the pre-emption laws of 1841 over the public lands in California. A state patent, in pursuance of the selection, purchase, and listing, as hereinbefore stated, was issued to defendant Avery on April 6, 1871.

The first question that arises is whether the land in question was open to selection by the State. The pre-emption act of 1841 provides that "no lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act." (5 Stat., 456, sec. 10.)

The act of March 3, 1853, extends the pre-emption laws of 1841 over the public lands in California whether surveyed or unsurveyed, "with the exception of sections 16 and 36, which shall be, and hereby are, granted to the State for the purpose of public schools in each township." "Excepting also the mineral lands," with other prescribed exceptions, and "with all the exceptions, conditions, and limitations therein, except as herein otherwise provided." (10 Stat., 246, sec. 6.)

222 It is further provided in section 7 that when a settlement has been made on sections 16 and 36 before the lands shall be surveyed, reserved, etc., "other lands shall be selected by the proper authorities of the State in lieu thereof." "Nor shall any person obtain the benefit of this act by a settlement or location on mineral lands."

In Mining Co. *vs.* Consolidated Mining Co. the Supreme Court held "that the land in controversy being mineral lands, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant. It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853." (102 U. S., 175.)

If sections 16 and 36 do not pass by the terms of the statute there certainly is no good reason for permitting the same kind of land to be selected under section 7 in lieu of sections 16 and 36. (10 Stat., 247, sec. 7.) In the act of June 1, 1864, it is provided "that when any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which as "mines" are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder," etc. (13 Stat., 343, sec. 1.) The act of March 3, 1865, further provides that any citizen who "may be in the business of *bona fide* actual coal mining on the public lands shall have the right to enter in legal subdivisions a quantity of land at the minimum price of twenty dollars per acre," etc. (13 Stat., 529, sec. 1.) The act of July 26, 1866, confirms selections made by the State under past legislation of any lands granted to the State, "provided that no selection made by the State contrary to existing laws shall be confirmed by this act" as to a certain designated class, "or to any mineral lands." (14 Stat., 218, sec. 1.)

Thus it will be seen by a glance at the several provisions of the statutes quoted that the statute of 1841 in express terms ex-

223 cludes from pre-emption or sale all lands containing "any

known mines;" and there is no jurisdiction or power in any officer of the Government to grant such lands.

The act of 1853 extending the said pre-emption laws of 1841 over California again expressly exempts "the mineral lands," and limits the act of 1841 in its operation by "all the exceptions, conditions, and limitations therein, except as herein otherwise provided." One of the exceptions therein, as we have seen, is "any known mines," and this limitation is not otherwise extended in the act of 1853. Again, in section 7, authorizing, in certain cases, the selection of other lands in lieu of sections 16 and 36, it is again carefully provided that no person shall "obtain the benefits of this act by a settlement or location on mineral lands." Thus, if coal mines are "known mines" or "mineral lands," within the meaning of these acts, they were expressly excluded from pre-emption, sale, or selection under these acts, and there is no other act authorizing a selection. Are they "known mines" or "mineral land" within the provisions of the act of Congress?

It is conceded that prior to the passage of the act of 1864 cited the Land Department at Washington did not regard or treat coal lands, or coal mines, as mineral lands within the meaning of the prior acts of Congress. It is so stated by Commissioner Drummond, *in re* Yoakum. (Copp's Public Land Laws, 674) But I am not aware of any judicial construction of the words of the statute, as relating to coal lands. Whatever the proper judicial construction may have been prior to the act of 1864, Congress has itself in that act given a legislative construction to the provisions in question which is conclusive upon the courts and departments from that time forward. Congress may not have the power by a legislative construction which a statute will not bear to affect the rights of parties already properly and legally vested under the statute, but it may certainly give a legislative construction, which shall apply to all future cases and all subsequent acts. This it has, in my judgment, done in the present instance, whatever the proper prior construc-
224 tion may have been. The language, it has been seen, is, "when any tract embracing coal-beds or coal-fields, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of eighteen hundred and forty-one, and which, under past legislation, are not liable to ordinary private entry," it shall be lawful to dispose of them in a prescribed mode entirely different, and on much more onerous terms than are applicable to other public lands, and these terms are modified, but still different from other public lands in several and all subsequent acts of Congress. Here is a manifest intent to include coal lands in the definition of the terms "mines, mineral land," as used in the act of 1841, otherwise the whole object and purpose of this part of the act and "past legislation" would fail.

There are no coal lands as such mentioned in the act of 1841, or "which 'as mines,' are excluded from the pre-emption act," or which under past legislation are not liable to ordinary private entry, unless they are embracad in the term "mines" or "minerals" as used in the act of 1841 and subsequent acts. Upon any other construction

of the act of 1864 and subsequent acts providing for a disposition of the coal lands in the public domain there would be, absolutely, no lands and no subject-matter upon which these provisions in question could operate, as the coal lands provided for are only such as were excluded as "mines" in the act of 1841 and "past legislation." All coal lands not before excluded as "mines" would be governed by the ordinary statutory provisions as to a disposition of the public domain. On any other hypothesis no change in the law would be effected. It appears to me, therefore, to be indisputable that, at least since the act of 1844, and subsequent acts on the subject, coal lands have by legislative definition of the term "mines," as used in the act of 1841, been excluded from sale or selection otherwise than as provided in those acts. In view of these acts and this legislative definition, also the act of 1866 — excepts coal lands improperly selected from confirmation under the terms of that act, and especially under the words any "mineral lands," in the first section.

225 There are railroad grants, it is true, which especially and by express terms provide that coal lands shall not be deemed mineral within the provisions of those acts. But this only shows that in the opinion of Congress they would be included if not specially in terms excluded.

From these considerations I am of opinion that the land in question was not subject to selection, and that the Secretary of the Interior had no power to list over to the State, or the State to grant, a valid patent for it. The land not only contained coal mines, but, in the language of the act of 1841, "known mines" of coal, which were being actually and notoriously worked, and had been so worked for a period of seven years at the time defendant, Mullan, applied for their purchase from the State, and more than eleven years when he assigned to defendant, Avery. The State had no vested right, as is claimed by defendant's counsel it had, to select lands in lieu of sections 16 and 36, so that the right to select could not be withdrawn from any particular lands or class of lands at any time before selection actually made. The indefeasable right to any particular land can only attach at the time of selection. (Ryan *vs.* C. P. R. R. Co., 5 Saw., 260, affirmed in 99 U. S., 388; Hutton *vs.* Frisbie, 37 Cal., 476; Frisbie *vs.* Whitney, 9 Wal., 187.) If she had an indefeasable vested right before an actual selection there could be no final disposition of the public domain, so as to secure the grantee of the Government a perfect title till all the State selections should be made. If the State had an indefeasable vested right to select from any public land, then any grantee of the Government before the State's right is satisfied would take the title, subject to be defeated by a subsequent State selection.

Upon the only other substantial question in the case I have as little doubt, viz., that the selection listing over to the State, and the patent issued thereon by the State, can be decreed void or annulled on a bill in chancery directly filed by the United States for that purpose. The numerous decisions cited to show that the ex-

226 amination and decision of the Land Department upon the facts is conclusive, are mostly, if not all of them, collateral

proceedings, where it is sought to attack the acts of those officers at law, and not by direct proceedings by the Government to annul the patent.

In cases like this there is no jurisdiction or power in the offices of the Land Department to affect the title of the United States. There were "known mines" on the land openly and notoriously worked. It was an obvious, public, notorious, historical fact, open to everybody's observation. The plats of surveys in the public land office showed it to be so. A public mining town was situate on the land, occupied by miners actually engaged in working the mines. No one could be possibly ignorant of the character of the land who would investigate, or, in fact, without actually shutting his eyes against open, public, notorious, obvious facts. Mullan must have known, and Avery must have known, the truth, or else they were wilfully ignorant and blind to what the law required them to see and know. They may not have been—probably never were—on the land; and they may have never seen with their own eyes what was going on in that region, but they are bound to know, and will be deemed in law to know, what every one must see if he will take the trouble to look at land notoriously and obviously occupied as this land was. And the same must be true with respect to the public officers, whose duty it was to deal with the land, having in their office plats and surveys shewing that there are known coal mines on the land. There must have been either fraud, mistake, or an error of law upon known facts in the several transactions resulting in the patent; and either is sufficient to annul it, and is sufficiently presented by the bill.

I am not disposed to think that there was actual wilful fraud intended by either of the defendants or the officers of the Government. It is much more probable that there was an inadvertence or mistake or an error in law upon the known facts, for it is scarcely to be believed that the facts were not known at least to the parties in this region. Indeed they were discussed between the defendant, Mullan, and the surveyor general of California, and even Avery, upon
227 his own testimony, had his attention, in fact, called to the probability that coal might be found on the land; and this was doubtless one of the inducements to advance money on it. As coal lands had been sold prior to the act of 1864 as ordinary lands, it may be that there was a misapprehension at the local land office as to those lands being open to selection; and the facts prior to the listing being presented by parties at Washington, probably *ex parte*, it would seem that they may not have been fully comprehended or appreciated.

If the Secretary of the Interior was not in fact informed, and the listing was in ignorance of the facts, then there was an inadvertence or mistake. If he did know the facts, he acted beyond the scope of his jurisdiction and authority, and his act was void for want of power. That a bill on behalf of the United States will lie to annul those proceedings is clear from the authorities.

In Moore *vs.* Robbins, 96 U. S., 533, the Court says upon this point: "If fraud, mistake, error, or wrong has been done, the courts

of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed of conveyance of the land as to individuals, and if the Government is the party injured this is the proper course." A patent is the deed of the Government.

In United States *vs.* Stone, 2 Wall., 525, the Court says: "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake where the officer has no authority in law to grant them, or where another party has a higher equity, and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. It is contended here by counsel of the United States that the land for which a patent was
228 granted to the appellant was reserved from sale for use of the Government, and consequently that the patent was void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed." Such a bill is this in relation to lands reserved from selection and patent under the acts in question, and the allegations of the bill are fully sustained by the proofs. United States *vs.* Hughes, 4 Wall., 235, and United States *vs.* Hughes, 11 How., 555, and Johnson *vs.* Towsley, 13 Wall., 83–4, establish the same principle.

In this case there must have been either fraud, an inadvertence, or mistake, or an error of law upon known facts; for in the very nature of things, in view of the open, public, notorious occupation of the lands, and the extensive mining for coal thereon, it is impossible that there could be any error of judgment as to the facts had the evidence been laid before the officers of the Land Department of the Government.

An objection is made that the bill is not filed by the Attorney General and in his name. The bill commences: "The United States of America, by Philip Teare, United States attorney in and for the District of California, brings this bill of complaint, and thereupon your orator complains," etc. It is signed at the foot of the bill after the prayer for relief, "Charles Devens, Attorney General, by Philip Teare, United States attorney for the District of California." I think it appears from the record that the Attorney General brings or authorizes, the filing of the bill, has control, and is the responsible manager of the case within the principle stated in U. S. *vs.* Throckmorton, 98 U. S., 70. So also it appears to me that the letter of the Attorney General set out in the answer is full authority for the proceeding. But this bill was signed upon authority

of another letter of the Attorney General expressly written for the purpose.

This suit is doubtless prosecuted at the instigation of the Black Diamond Coal Company; and while the company, after working and exhausting the coal for years without availing itself of
229 the right to purchase the land at a comparatively small sum, as it might and honestly should have done, and is therefore entitled to little sympathy should the defendants gain the land, yet the United States has seen fit to intervene to vacate the proceedings, as it had a right to do, and there must be a decree for the complainant annulling the State selection, the listing, and the patent thereon, and it is so ordered.

February 27, 1882.

PHILIP TEARE AND W. H. L. BARNES,
For Complainant.

B. S. BROOKS, *For Defendants.*

(Endorsed:) Read in open court February 27, 1882. L. S. B. Sawyer, clerk.

230 UNITED STATES OF AMERICA:

Memorandum of Costs and Disbursements.

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

UNITED STATES, Plaintiff, *vs.* JOHN MULLAN *et al.*, Defendants.

Disbursements:

Copy field-notes	$5	
Marshal's fees	4	
Certified copy of plats	2	
Clerk's fees	78	60
Examiner's fees	112	10
Witness fees: John W. Bost, 156 miles, & one day	17	10
Benj. Jones, 365 miles, & one day.		
Asher Tyler & John A. Davis, 56 miles, & one day each	14	20
Geo. H. Thompson, one day	1	50
8 depositions	20	
Docket fee	20	
	$312	50
	38	
	$284	50

UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco, } *ss:*

Philip Teare, being duly sworn, deposes and says: That he is the

attorney for the United States, plaintiff in the above-entitled
231 cause, and as such is better informed relative to the above costs and disbursements than the said plaintiff; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in said cause.

PHILIP TEARE.

Subscribed and sworn to before me, this 3d day of March, A. D. 1882.

S. C. HOUGHTON,
Commissioner U. S. Circuit Court, &c.

(Endorsed:) To B. S. Brooks, Esq'r, attorney for defendants: You will please take notice that on Monday, the 6th day of March, A. D. 1882, at the hour of 10.30 o'clock a. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided. Philip Teare, attorney for plaintiff.

232 *Copies from the Printed "Transcript on Appeal" to the State Sup. Court.*

State Patent.

UNITED STATES OF AMERICA, *State of California:*

To all to whom these presents shall come, Greeting:

Whereas under the provisions of the several acts of the Congress of the United States entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September fourth, eighteen hundred and forty-one, five hundred thousand acres of the public lands were granted to the State of California, and an act entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, eighteen hundred and fifty-three, ten sections of land were granted for the erection of public buildings, and seventy-two sections for a seminary of learning, also the sixteenth and thirty-sixth sections of each township in said State; also an act entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, one hundred and fifty thousand acres of the public lands were also granted to said State; and whereas the Legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time; and whereas it appears by the certificate of the register of the State land office, No. 609, issued in accordance with the provisions of law, bearing date the sixth day of April, A. D. 1871, that the tracts of 16th and 36th section-grant land hereinafter described have been duly and properly located in accordance with law, and that Francis Avery is entitled to receive a patent therefor:

Now, therefore, the State of California hereby grants to the said

Francis Avery, and to his heirs and assigns forever, the said tracts of land, located as aforesaid, and which are known and described as follows, to wit: The north half of section eight (8), township one (1) north, range one (1) east, of Mount Diablo meridian, con-
233 taining three hundred and twenty acres, taken in lieu of three hundred and twenty acres, together with all the privileges and appurtenances thereunto appertaining and belonging, to have and to hold the afore-granted premises to the said Francis Avery, and to his heirs and assigns, to his and their use and behoof forever.

In testimony whereof I, H. H. Haight, Governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed.

Given under my hand, at the city of Sacramento, this the sixth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

[Seal of State.]

H. H. HAIGHT,
Governor of State.

Attest:

H. L. NICHOLS,
Secretary of State.

(Countersigned:)

J. W. BOST,
Register of State Land Office.
Per E. TWITCHELL,
Deputy.

(Endorsed:) Letters patent from the State of California. Issued April 6th, 1871, to Francis Avery for 320 acres of 16th and 36th section grant school land, lying in Contra Costa county.

Plaintiff's attorney then offered in evidence a certified copy from the State land office of the certificate of purchase upon which the said patent was issued, dated May 21st, 1869, issued to John Mullan, together with the assignment to plaintiff, acknowledged March 28, 1871, as follows:

Certificate of Purchase.

State Land Office of the State of California.

234 No. 1935. SACRAMENTO, *Sept. 21st day of May*, 1869.

It appearing from the certificate of the county treasurer, bearing date the 5th of May, A. D. 1869, that John Mullan has paid to the State of California the sum of one hundred and one $\frac{65}{100}$ dollars, being twenty per cent. of the purchase money and first year's interest on the balance, in advance, for three hundred and twenty acres of State school land, described as follows: In location No. 1651, surveyed lands, San Francisco land district, the north half of section eight (8), in township No. 1 north, range No. 1 east, Mount Diablo meridian: Now, therefore, be it known that the said John Mullan, having made payment of said twenty per cent. and first

year's interest for the above-described tract of land, is the purchaser of the same, and after having in all other respects complied with the requirements of the laws providing for the sale of said lands, and the same have been confirmed to the State, and on surrendering this certificate to the State of California, the said John Mullan shall be entitled to receive a patent for the same.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office, the day and date above mentioned.

[SEAL.]

J. W. BOST,
Register of State Land Office,
Per E. TWITCHELL, *Deputy.*

(Cancelled patent issued.)
320 acres taken for 320 acres.
Balance of purchase-money due, 320 dollars.
Interest to be computed from April 27th, 1869.

(Endorsed:) Received from John Mullan three hundred and sixty dollars, being payment in full of principal and interest for the within-described tract of land, county treasurer's office,
235 Contra Costa county, first day of April, 1871.

JOHN R. L. SMITH,
County Treasurer.

State Certificate of Purchase—Mullan's Assignment to Avery.

For value received, I, the undersigned, hereby transfer and assign the annexed certificate of purchase, No. 1935, for three hundred and twenty acres of State school land, unto Francis Avery, and I do hereby authorize the said Francis Avery to receive a patent from the proper authorities for the same.

JOHN MULLAN.

STATE OF CALIFORNIA, *City and County of San Francisco:*

On this 28th day of March, A. D. one thousand eight hundred and seventy-one, personally appeared before me, John Mullan, and to me known to be that individual, and acknowledged that he executed the above instrument, and that the same was done freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, this 28th day of March, 1871.

W. H. CHEEVERS, [SEAL.]
Notary Public.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify the annexed to be a full, true, and correct copy of the original document on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal, this 8th day of August, 1871.

[State Land Office Seal.]

J. W. BOST,
Register State Land Office,
Per E. TWITCHELL,
Deputy.

236 Plaintiffs' counsel offered in evidence a duly-certified copy of the application of John Mullan, dated August 23d, 1868; also affidavit, made 24th of August, 1868, approved 25th August, 1868; certificate of location of the surveyor general, dated April 27th, 1869, as follows:

Application for Location Under the State.

Location No. 1651. Land district.

SAN FRANCISCO, *August* 23*d*, 1868.

To John W. Bost, surveyor general:

I, John Mullan, of San Francisco county, State of California, do hereby apply, under the provisions of an act entitled "An act to provide for the management and sale of the lands belonging to the [illegible]" approved March 28th, 1868, to purchase and locate the follow-

[U. S. internal revenue stamps, $2.50, cancelled.]

Know all men by these presents that I, John Mullan, of the city and county of San Francisco, in the State of California, doing business as a real estate agent at No. 712 Montgomery street, in said city, for and in consideration of the sum of one dollar in gold coin of the United States of America to me in hand paid by Francis Avery, formerly of Cincinnati, Ohio, and New York city, now pres-
240 ently residing at No. 717 Post street, in the city of San Francisco aforesaid, the receipt of which sum is hereby acknowledged, and for divers other good causes and considerations, me thereunto moving, have bargained, sold, assigned, transferred, and set over, and by these presents do bargain, sell, assign, transfer, and set over, unto the said Francis Avery, and his legal representatives, all and every right or cause of action which I now have, or hereafter may or ought to have, against the Black Diamond Coal Company, or any other company, or person or persons, for or because of or on account of any waste or injury committed upon the north half of section eight (8), in township one (1) north, range one (1) east, Mount Diablo base and meridian, according to the United States survey, situated in the county of Contra Costa and State of California, or for or because of or on account of the taking of coal therefrom, or the taking of the rents, issues, profits, or espleas thereof, and any right or cause of action for mesne profits which I may now have or hereafter be entitled to in respect to said land above described against any person or persons, company or companies, body or bodies, corporate or otherwise, whatever.

To have and to hold [illegible] been sectioned and subject to pre-emption since 1864; that said occupants (names unknown), if any, have been in occupation for more than sixty days, and said lands now belong to the State.

Witness my hand.

JOHN MULLAN.

Subscribed and sworn to before me, this 24th day of August, A. D. 1868.

[SEAL.] SAM. HERMANN,
Notary Public.

I, John W. Bost, surveyor general of the State of California, do hereby accept the above offer, under the following conditions: That if such location be made and approved by the United States it shall be for the use and benefit of the applicant, on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved March 28th, 1868.

JOHN W. BOST,
Surveyor General.

Surveyor general's office, 25th August, 1868.

Grant of the Sixteenth and Thirty-Sixth Sections for School Purposes. Certificate of Location.

238 Location No. 1681.

Interest to be computed from April 27th, 1869.

(Endorsed:) Received from John Mullan three hundred and sixty dollars, being payment in full of principal and interest for the within-described tract of land, county treasurer's office,
235 Contra Costa county, first day of April, 1871.

JOHN R. L. SMITH,
County Treasurer.

State Certificate of Purchase—Mullan's Assignment to Avery.

For value received, I, the undersigned, hereby transfer and assign the annexed certificate of purchase, No. 1935, for three hundred and twenty acres of State school land, unto Francis Avery, and I do hereby authorize the said Francis Avery to receive a patent from the proper authorities for the same.

JOHN MULLAN.

STATE OF CALIFORNIA, *City and County of San Francisco:*

On this 28th day of March, A. D. one thousand eight hundred and seventy-one, personally appeared before me, John Mullan, and to me known to be that individual, and acknowledged that he executed the above instrument, and that the same was done freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, this 28th day of March, 1871.

W. H. CHEEVERS, [SEAL.]
Notary Public.

(Endorsed:) Certificate issued. Patent issued. Grant of the 16th and 36th sections for school purposes. San Francisco land district. Location No. 1651. Mt. Diablo meridian. Township No. 1 north, range No. 1 east, section 8. Taken in lieu of E, ½ of section
239 16, in township No. 2 north, range No. 8 west, Diablo meridian. Containing 320 acres in lieu of 320 acres located for John Mullan. Rec'd and filed 25th August, 1868. Approved 27th April, 1869. John W. Bost, surveyor general.

STATE OF CALIFORNIA, SURVEYOR GENERAL'S OFFICE.

I hereby certify the annexed to be a full, true, and correct copy of the original document on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal this 4th day of August, 1871.

[Surveyor General's Seal.]

J. W. BOST,
Surveyor General,
Per E. TWITCHELL, *Deputy.*

Plaintiff's counsel then offered in evidence an assignment from John Mullan to Francis Avery, plaintiff here, dated March 28, 1871, as follows:

Assignment to F. Avery.

[U. S. internal revenue stamps, $2.50, cancelled.]

Know all men by these presents that I, John Mullan, of the city and county of San Francisco, in the State of California, doing business as a real estate agent at No. 712 Montgomery street, in said city, for and in consideration of the sum of one dollar in gold coin of the United States of America to me in hand paid by Francis Avery, formerly of Cincinnati, Ohio, and New York city, now pres-
240 ently residing at No. 717 Post street, in the city of San Francisco aforesaid, the receipt of which sum is hereby acknowledged, and for divers other good causes and considerations, me thereunto moving, have bargained, sold, assigned, transferred, and set over, and by these presents do bargain, sell, assign, transfer, and set over, unto the said Francis Avery, and his legal representatives, all and every right or cause of action which I now have, or hereafter may or ought to have, against the Black Diamond Coal Company, or any other company, or person or persons, for or because of or on account of any waste or injury committed upon the north half of section eight (8), in township one (1) north, range one (1) east, Mount Diablo base and meridian, according to the United States survey, situated in the county of Contra Costa and State of California, or for or because of or on account of the taking of coal therefrom, or the taking of the rents, issues, profits, or espleas thereof, and any right or cause of action for mesne profits which I may now have or hereafter be entitled to in respect to said land above described against any person or persons, company or companies, body or bodies, corporate or otherwise, whatever.

To have and to hold the above bargained, sold, assigned, and transferred rights, privileges, demands, and cause or causes of action above recited, as also the above-described premises, to the said Francis Avery and his legal representatives, for his and their sole use and benefit forever.

In witness whereof I have hereunto set my hand and seal at the said city of San Francisco, this twenty-eighth (28th) day of March, A. D. one thousand eight hundred and seventy-one.

JOHN MULLAN. [SEAL.]

Plaintiff's counsel offered in evidence, under certificate and seal of the Department of the Interior, General Land Office, March 27th, 1872, signed Willis Drummond, Commissioner of the General Land Office, a certified copy of an original letter, addressed by Wil-
241 lis Drummond, Commissioner, to the Governor of the State of California, as follows:

Letter from Commissioner of General Land Office to Governor of California.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 27, 1872.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of the original now of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[General Land Office Seal.]

WILLIS DRUMMOND,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 14*th*, 1872,

His Excellency the Governor of California, Sacramento, Cal.

SIR: Referring to our letter of Sept. 6, 1871, to your predecessor in office, requesting him to relinquish the N. ½ sec. 8, T. 1 N., 1 E., supposed to have been erroneously certified to the State, in list No. 19 of school indemnity selections, approved January 3, 1871, I have now to state that from a further examination of the case it is found that the allegation of facts as set forth in that letter were erroneous, and that there now appears to be no valid grounds for interference on the part of this office in the case. I have, therefore, to request that you will return the letter above referred to to
242 this office, as the request therein contained is hereby withdrawn, and all action by this office, as against the title of the claimant under the State subsequent to the certification of the tract, is hereby rescinded.

I have the honor to be, very respectfully, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

243 At a stated term, to wit, the February term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Saturday, the first day of April, in the year of our Lord, one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Allowing Appeal.

THE UNITED STATES *vs.* JOHN MULLAN *et al.*

Now, at this day, on motion of B. S. Brooks, Esq'r, solicitor for the defendants herein, it is ordered that an appeal from the decision rendered and the decree entered in the above-entitled cause on the 27th day of February, A. D. 1882, of the February term, A. D. 1882, of the circuit court of the United States of America to the Supreme Court of the United States, be, and the same is hereby, allowed, and that a certified transcript of the pleadings, depositions, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States, upon the appellants giving a bond in the sum of one thousand dollars.

244 *Bond on Appeal.*

In the Circuit Court of the United States, 9th Circuit, District of California.

UNITED STATES *vs.* JOHN MULLAN *et al.*

Know all men by these presents that we, John A. Benson and John H. McNee, as sureties, are held and firmly bound unto the United States in the sum of one thousand (1,000) dollars, to be *had* to the United States, to which payment, well and truly to be *paid*, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated April 4th, 1882.

JOHN A. BENSON. [SEAL.]
JOHN H. McNEE. [SEAL.]

Whereas the above-named John Mullan and Francis Avery have prosecuted an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the circuit court of the United States for the district of California, entitled "The United States *vs.* John Mullan and Francis Avery:" Now, therefore, the condition of this obligation is such that if the above-named John Mullan and Francis Avery prosecute their said appeal to effect and and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

245

JOHN A. BENSON.
JOHN H. McNEE.

UNITED STATES OF AMERICA, } *ss:*
District of California, }

John A Benson and John H. McNee, being duly sworn, each for himself says that he is a freeholder and resident of the State of California; that he is worth the sum of one thousand (1,000) — over and above property exempt from execution, and over and above his just debts.

JOHN A. BENSON.
JOHN H. McNEE.

Subscribed and sworn to before me the 4th day of April, A. D. 1882.

[Seal of S. S. Murfey, N. P.]

SAM'L S. MURFEY,
Notary Public.

(Endorsed:) United States *v.* John Mullan *et al.* Bond. Filed April 5, '82. L. S. B. Sawyer, clerk.

Approved April 4, 1882.

(Signed) LORENZO SAWYER,
Circuit Judge.

246 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing two hundred and forty-five written pages, numbered from 1 to 245, inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in the within-entitled suit.

Witness my hand and the seal of said circuit court this twenty-second day of November, A. D. 1882.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

Endorsed on cover: California. C. C. U. S. No. 203. John Mullan and Francis Avery, appellants, *vs.* The United States. Filed 12th March, 1883.

118-271

OFFICE OF THE CLERK U. S.
FILED
MAR 29 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JOHN MULLAN AND FRANCIS AVERY, *Appellants*,

vs.

THE UNITED STATES.

No. 200.

Appeal from the Circuit Court of the United States for the District of California.

BRIEF FOR APPELLANTS.

WALTER H. SMITH,
Solicitor for Appellants.

R. O. Polkinhorn & Son, Printers.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JOHN MULLAN AND FRANCIS AVERY, *Appellants*,

vs.

THE UNITED STATES.

In Equity. No. 203.

Appeal from the Circuit Court of the United States for the District of California.

STATEMENT OF THE CASE.

The United States, on the 9th of July, 1878, filed its bill in equity, in the Circuit Court of the United States for the District of California, against John Mullan and Francis Avery, the appellants, to set aside the listing to the State of California, by the Secretary of the Interior, of the north half of section 8, Township 1, east, Mount Diablo Meridian, situated in Contra Costa County, California, and also to set aside a patent for said premises, issued by the State of California to the defendant Avery.

The bill alleges that said tract was mineral land, containing coal and other minerals, and that it was erroneously and wrongfully listed to the State, on the 30th of January, 1871, as a school indemnity selection in lieu of the east half of

Section 16, Township 2, North Range 8, West Mount Diablo Meridian, which last named tract had been lost to the State, being included in a valid private grant; that the defendant Mullan had applied to the Surveyor-General of the State, on the 25th of August, 1868, to purchase said first named tract, under the provisions of the act of California providing for the sale of the lands belonging to the State, approved March 28, 1868; that said Surveyor-General, on the 27th of April, 1869, duly certified that he had located as a portion of school lands belonging to the State said north half of Section 8, in lieu of said east half of Section 16; that the said Surveyor-General, May 21, 1869, issued to the defendant Mullan a certificate of purchase for said north half of Section 8; and that afterwards, and on application of the agent of the State, the United States listed said tract to the State in list No. 19 of California School Indemnity Selections, dated January 3, 1871.

That the defendant, Mullan, on the 28th of March, 1871, assigned, in writing, his said certificate of purchase to the defendant, Francis Avery, and all his right of action against the corporation, known as the Black Diamond Coal Mining Company, for taking coal out of ore from said north half of section 8; that said assignment was merely colorable, and that thereafter, both Mullan and Avery conspired together to obtain a patent from the State; that they well knew that said north half of section 8 was mineral and coal land, and not agricultural; and that a patent was issued by the State, to Avery, for the same on the 6th of April, 1871.

The bill further charges that the State of California claimed to select and locate said north half of section 8, under the Act of Congress, approved March 3, 1853, and that it, the said State, did by its agents and officers, falsely represent and pretend that the tract located and selected as aforesaid, was subject to such location and selection, under the laws of the United States, and that upon such representa-

tion, said State did procure wrongfully and to the fraud and injury of the United States, the listing of the same, by the United States, to the State of California; that the Department of the Interior relied upon said representations and pretences and erroneously supposed, and was induced to believe that said tract was subject to location and selection by the State, whereas all and singular said representations were false and untrue in point of fact, and so known to be false and untrue by the officers and agents of the State making the same.

The bill charges that said north, half of section 8, was double minimum land, being an even section on the line of the Central Pacific Railroad, and that the selection, location and listing of said tract was done unadvisedly, through inadvertence and mistake, and without color of law, because the land was mineral land, containing coal and other minerals, and known to be such by Mullan and the Surveyor-General; and because the land was surveyed in March 1864, by the United States Deputy Surveyor, without authority of law, the act of March 3d, 1853 only authorizing the township lines to be surveyed; and because said tract was then in the possession of the Black Diamond Coal Mining Company, which had a subsisting valid claim to the same, under the Act of March 3d, 1865, all of which was well known to the said Mullan and Avery; that their object in procuring the listing and patent was only and solely to obtain a colorable title to said land, under which to harrass said Black Diamond Coal Mining Company by the institution of vexatious and expensive suits, in the courts of the State, for the possession of said premises and improvements, and to extort from said company large sums of money as damages for coal extracted and removed from the same; that they did bring and maintain an action of ejectment for said premises and recovered the possession thereof in June 1877; and that action at law is now pending

against said company for a large sum of money, to wit: $3,000,000, for coal alleged to have been removed from said land.

The bill prays that the listing of said lands may be decreed to have been obtained by fraud and declared null and void; and that the patent for said land from the State may be adjudged and decreed to have been obtained by fraud and mistake and declared null and void, and that an injunction may be allowed during the pendency of the suit, and for general relief.

The defendants demurred to the bill, which, being overruled, they filed their answer on the 18th of November, 1878.

They denied that the said north half of section 8 was public land when the bill was filed; they denied that the same was mineral land, or double minimum land. They admitted that there had been a bed of coal in a portion of the land which the Black Diamond Coal Mining Company had mostly removed before the land was listed to the State. They admitted the listing of the land to the State, but denied that it was done wrongfully or erroneously, or under the circumstances stated in the bill. They denied that Mullan knew that the land was mineral, or that he designed or contrived to obtain the same unlawfully or fraudulently. They admitted the application to purchase and the issuing of the certificate of purchase, and the listing by the United States. They admitted the assignment by Mullan to Avery, but denied that it was colorable or without consideration. They denied that either of them knew that said land was mineral. They alleged that the whole of it was agricultural in its nature and quality, and could be used for agricultural purposes. They admitted the issuing of the patent, by the State, to Avery.

They denied that the agents or officers of the State made any false pretences or procured said listing wrongfully or to

the fraud or injury of the United States, or that the Department of the Interior was induced to act upon any false representations or pretences, or that it had no authority to list said land, or that it did so through inadvertance or mistake. They admitted that the Black Diamond Coal Mining Company was in possession of said land when Mullan applied to purchase, but denied that it had any right to enter upon or hold possession of the same, either under the act of March 3, 1865, or any other act or law, and alleged that it was a mere trespasser upon the same. They denied the allegations in the bill that they had acquired title for the purpose of annoying the said Black Diamond Coal Mining Company. They admitted the recovery of possession by an action of ejectment as alleged.

They denied that said tract was classed as coal land by the United States Surveyor. They admitted the pendency of a suit to recover damages from the said Black Diamond Coal and Mining Company.

They denied that this suit was instituted or prosecuted under the authority of the United States, but alleged that it was brought for the benefit and at the instance of said Black Diamond Coal and Mining Company, and at its costs, and that the said company had "no right, title, or interest or estate, legal or equitable, in the said tract of land."

They alleged that the questions involved were questions of fact, and that they had been examined and determined in the Interior Department; that they were brought to its attention more than six years ago at the instance of the said Black Diamond Company, and were fully considered and finally determined in favor of the validity of said listing, on the 14th of March, 1872, and that said decision has never been appealed from and is in full force.

They alleged that the Black Diamond Company had, on the 13th of May, 1865, through its Secretary, Frank Barnard, applied in the name of said Barnard, for the selection

and location of said north half of section 8, and that the application was received and filed in the office of the Surveyor General of the State and approved by him, but through the laches of the said company in not paying for the same as required by the State law, the right was forfeited on the 1st day of October, 1865, and thereafter the said tract was open to purchase by all citizens of the State; and they alleged that the said company, having procured said land to be selected by the State was estopped from alleging that the same was not open to such selection or not lawfully selected by the State.

They denied that the said Mullan had ever seen said land, when he purchased the same, or that he knew that said Black Diamond Company had, or pretended to have, any claim to the same, or that there was any fraud or misrepresentation or confederacy whatever.

They alleged that Avery, at the time of his purchase from Mullan, had no knowledge that the Black Diamond Company claimed any interest in said land.

They alleged that the whole of said township 1, north range 1, east Mount Diablo meridian was sectionized when it was surveyed in 1864, except a small portion which was mountainous and worthless, and that nearly all of said sectionized portions and being immediately contiguous to the tract here in controversy had been conveyed by the United States to divers parties; some to the Western Pacific Railroad, some to pre-emptors, some to locators of military bounty land warrants, some to homesteaders, and some to locators of school land warrants and agricultural college scrip.

They denied all fraud, combination, &c.

A replication was filed December 2d, 1878.

The case was heard at the February Term, 1882, and resulted in a decree for the plaintiff setting aside the listing and the patent.

Assignment of Errors.

I. The Court erred in holding that the bill could be maintained in the name of the United States, and that it was prosecuted and controlled by the Attorney General.

II. The grounds for relief set forth in the bill were not *proved.*

III. The Court erred in holding that the proceedings in the Land Department were not conclusive and final.

IV. The Court erred in holding that the acts of June 1, 1864 and March 3, 1865, withdrew the land from State selection.

V. The decree should have been for the defendants.

I. The bill ought not to be maintained in the name of the United States.

It is not shown, on the face of the bill, that it is brought by authority of the Attorney General. It commences thus: "The United States of America, by Philip Teare, United States Attorney in and for the District of California." True, it is signed "Charles Devens, Attorney General, by Philip Teare, United States Attorney for the District of California." "Hoyt & McKee, Special Attorneys and of Counsel."

It is submitted that the bill does not show upon its face that it is filed under the supervision and authority of the Attorney General. If we look outside of the bill and into the record, we find just what the authority given by the Attorney General was. His letter to the U. S. District Attorney is found in the answer of defendants (Record, p. 24). It is as follows:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, *June* 18, 1878.

"JOHN M. COGLAN, ESQ, *U. S. Attorney, San Francisco, Cal.*

"SIR: I have received from the Sec'y of the Interior, in a letter of the 7th inst., an application from Messrs. Hoyt & McKee, of San Francisco, *on behalf of the Black Diamond Coal Company*, for permission to use the name of the United States in a suit to declare void the title of the State of California to the north ½ of section 8, in township 1 north, range 1 east, Mount Diablo meridian, Cal.

"After considering the facts in the application, in connection with the views of the Secretary of the Interior, I have concluded that the application should be granted, and I have therefore to-day *informed the representative of the company* that such suit may be brought, upon the *understanding that any and all costs and expenses in the matter shall be defrayed by the applicants*, and that the proceedings shall be subject to the direction and control of the Attorney General, in order that the interests of the Government may be fully protected and justice done to any and all parties interested.

"Very respectfully, CHAS. DEVENS,
"*Attorney General.*"

This letter is proved to be a true copy of the original by the testimony of District Attorney Teare. (Record, p. 108.)

This Court has used language, in reference to the bringing of suits in the name of the United States to set aside land patents, without the express direction of the Attorney General, which cannot well be misunderstood. In *United States* vs. *Throckmonton*, 98 U. S., 70, it said:

> "There is another objection to the bill, which though not going to the merits, is, in our opinion, equally fatal to it in its present shape. We are all of opinion that, unless by virtue of an Act of Congress, no one but the Attorney General, or some one authorized by him, can bring a suit to set aside a patent issued by the United States. . . . It would be a very dangerons doctrine, one threatening the title to millions of acres of land held by patent from the Government, if any man

> who has a grudge or a claim against his neighbor can, *by indemnifying the Government for costs*, and furnishing the needed stimulus to the District Attorney, institute a suit in chancery in the United States to declare the patent void."

And in *United States* vs. *Minor*, 114 U. S., 244, this Court said:

> "If by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question whether the United States could bring this suit for Spence's benefit."

That, I submit, is precisely the case made by the bill in this case. It is, upon the plainest admissions, made in the letter of the Attorney General, a suit *solely for the benefit of the Black Diamond Company, and at its costs.* Ought the United States to lend itself to such a proceeding?

Adopting the suggestion made in the Miner case, it is easy to say no.

I think that answer ought to be intensified when we look into the case made by the evidence. The record shows that this Black Diamond Company did not have at the time this suit was brought, nor since, *one particle of legal or equitable title to the premises in controversy.* We then have a case where the United States is prosecuting a suit to set aside a patent on the *application, and at the expense* of a party that *absolutely has no interest whatever* in the premises in controversy. If this is so, surely the United States is out of its proper sphere. It is so. The answer denies that the Black Diamond Company has any interest whatever. If it has, the burden to prove it is upon the company, and the proof could be easily made. The only laws under which it could acquire an interest in coal lands are those of June 1, 1864, 13 Stat., 343, Sec. 1, and March 3, 1865, do. 529, Sec. 1.

By the former, the President was authorized to cause tracts containing "coal beds or coal fields" to be offered at

public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre, and any lands not thus disposed of were thereafter to be subject to private entry at said minimum.

The lands now in controversy were not offered. Therefore, the Black Diamond Company could not and did not purchase them at private entry.

By the latter act, any citizen of the United States who, at the passage of the act (March 3, 1865), was in the business of *bona fide* actual coal mining on the public lands (not reserved for public uses by the President of the United States) for purposes of commerce could, upon making proof satisfactory to the register and receiver to that effect enter, according to legal sub-divisions a quantity of land, not exceeding 160 acres, to embrace his improvements and mining premises, at the minimum price of twenty dollars per acre; *Provided*, that when the premises were already surveyed, the citizen should make a sworn declaratory statement descriptive of his tract and premises, showing the extent and character of his improvements, and file the same within six months from the date of the act, and make proof and payment within one year from such filing.

The Black Diamond Company did file for 160 acres, but did not make payment at any time.

Its right to enter 160 acres of said 320 acres was forfeited at the expiration of eighteen months from the date of said act which would be September 2d, 1866. That was nearly two years before Mullen made his application.

At the time this suit was brought the Black Diamond Company was not even in possession of the premises The defendants were then in possession, under a judgment in ejectment in the State Court in their favor. So that what I have already said is proven to be true that *this Court is now asked to sustain a suit in the name of the United States, to set aside a patent, on the application, and at the cost and*

expense of a company that had not and has not a particle of right or title, legal or equitable, to the premises included in the patent.

I do not believe that this Court will sanction any such proceeding. If it does, then any stranger to the title whose heart might be filled with malice towards his neighbor, would be able to annoy and vex him by procuring the officials of the United States to bring a suit in the name of the United States, and at his own cost, to set aside the patent for the home on which he lived, and if it should turn out that there was some defect in the proceeding this Court would be bound to set aside the patent.

The Court will certainly pause before it establishes such a doctrine.

In the Throckmorton case it is well said:

> "In so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should also have control of it *in every stage*, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill. . . . It does not appear that he, or his successors, have ever given the slightest attention to the case. In the argument of it before us no officer of the Government appeared."

So it may be said in this case. With the exception of writing the letter above quoted, the Attorney General has had no connection with the case. Hoyt & McKee, whose names are signed to the bill, are the persons who appeared before the Attorney General as the attorneys of the Black Diamond Company and obtained permission to bring this suit. All the evidence in the case was taken in the absence of the United States District Attorney (except his own deposition), and by Mr. W. H. L. Barnes, who appear-

ed as counsel for the United States and signed all of the stipulations in the case except those that the practice required should be signed by the District Attorney. Record, pages 49, 59, 72, 75, 82, 85, 91, 101, 106, 107, 108, 124, 125. He appeared for the company before the Commissioner of the General Land Office and I am informed that he argued the case in the court below, and that the District Attorney did not.

I presume that it will not be denied that he is the attorney of the Black Diamond Company. Who will appear in this Court in the argument of the case on the part of the United States I am unable to state. All I know is that thus far no officer of the Government has entered his appearance in the case. I think I may safely say that the case has been managed and controlled hitherto by the Black Diamond Company, and that the connection of the Attorney-General with it has been colorable rather than real, and that the Black Diamond Company has endeavored to connect the Attorney-General with it, just enough to escape the condemnation pronounced by this Court in the Throckmorton case.

I verily believe that the Attorney-General would never have consented to bring this suit if he had known that the Black Diamond Company had no claim or right to the premises whatever.

II. The grounds for relief set forth in the bill have not been proved.

Those grounds are that the agents and officers of the State, by false and fraudulent representations procured the officers of the United States to list the land in controversy to the State; that the officers of the Interior Department relied upon those representations, and were induced thereby to list the same; that they acted through inadvertance and mistake, and that the land was mineral land and double

minimum, and not subject to selection by the State, and that Mullan and Avery knew it.

In the first place as to the false and fraudulent representations. There is no testimony whatever to sustain them. No person made any false representations, and no one was deceived by them. With the first selection made by the State for these premises the defendants had nothing to do. The land had been surveyed in 1864, long before the defendants had any connection with it. There is no evidence that the Deputy Surveyor who ran the lines, or the Surveyor-General who approved of the plats, was approached by any one or in any way interferred with or influenced in the regular discharge of his duty, or that he did not in all respects conduct himself and his survey as the law directs. There is no evidence that any of the State officers, who were charged by law with duties relating to State selections acted improperly. There is no evidence that any of the United States officers, who were required to pass upon State selections acted improperly, or that any effort was made by any one to induce them to act improperly. In brief so much of the bill as charges improper conduct or motives, or fraud, or false or fraudulent representatives utterly fails in the proof.

The answer denies that the land was double minimum, and there is no proof that it was. There is no evidence that Avery knew the land was coal land at the time of his purchase,and the evidence that Mullan knew it is very slight. It consists of his statement that he knew there was coal in the neighborhood. The only possible ground for the bill to rest upon is that the officers made a mistake—an innocent mistake—in selecting, locating and testing the land as public land when in fact it was as is alleged—mineral land and not subject to location; and that brings me in the

second place, to the inquiry whether they did make such mistake, and whether the land is in point of fact mineral.

How are government officers who are charged with the disposition and sale of the public lands to know whether given tracts are subject to disposition under general laws, or are mineral?

They cannot be expected to make a personal examination and to act upon personal knowledge. They must act upon the means of information which the law has placed in their reach, and that is the field notes and plats and surveys made by the sworn officers of the United States. It is the duty of those officers to designate the mineral tracts on their plats and their field notes, and to refuse to sectionize lands that are mineral.

The statute requires:

> "Seventh. Every surveyor shall note in his field book the true situations of *all mines*, salt licks, salt springs, and mill seats which come to his knowledge; all water courses over which the line he runs may pass; and also the *quality of the lands*. Rev. Stat., Sec. 2395.
>
> "Eighth. These field books shall be returned to the Surveyor General, who shall cause therefrom a *description* of the whole lands surveyed to be made out and transmitted to the officers, who may superintend the sales." Do.

The statute provides that:

> "The printed manual of instructions, prepared at the General Land Office, and bearing date February 22, 1855, the instructions of the Commissioner of the General Land Office, and the special instructions of the Surveyor General, where not in conflict with such printed manual, or the instructions of the Commissioner, shall be taken and deemed a part of every contract for surveying the public lands." (Rev Stat., Sec. 2399.)

The manual of instructions referred to contains, under the head of "summary of objects and data required to be noted," the following:

> "14. *Coal* banks or beds, *peat* or turf grounds, *minerals* and ores, with particular description of same as to quality and extent and all *diggins* therefor, also *salt* springs or licks. All reliable information you can obtain respecting these objects, whether they be on your immediate line or not, is to appear in the general description to be given at the end of the notes." (Manual Surveying Instructions, p. 18.)

When we look at the survey of the land in question, we find that the surveyor did not regard it as mineral land. He made his survey, examined the land, went into the works of the Black Diamond Company, and then reported that the land was rolling land, second and third-class. He returned it as agricultural land. He noted coal mines on one 40-acre tract. (Record, p. 118.) Upon such a state of the case the officers of both Governments, State and National, and purchasers, had a right to treat the land as non-mineral, and to make their selections, locations, and listings accordingly. All lands which contain mineral are not mineral lands in the eye of the law. Vast tracts in California contain more or less minerals. Mineral lands are those that in fact contain *valuable* minerals, and have been withdrawn from sale by the action of the proper officers of the Government, and that fact is shown by their plats.

It is not every kind of mineral that may be found in land that makes it mineral land in contemplation of law. Iron is a mineral, but land containing iron in great quatities was not prior to 1872, regarded as mineral land. Coal is a mineral, but I shall undertake to show that lands containing coal have not not been regarded, in the legislation of Congress as mineral lands. Coal underlies large tracts in Ohio, Indiana, Illinois, Iowa, Kentucky, Missouri, and Kansas,

and yet all of these tracts have been disposed of by the Land Department and treated by Congress as non-mineral lands. The first legislation of Congress that raises a doubt upon the subject is the act of July 1, 1864, 13 Stat., 343, before quoted. That is a peculiar act and somewhat difficult of construction. The first section alone relates to coal land; the remainder to town sites. This is its language:

> "*Be it enacted, &c.*, That *where* any tracts embracing coal-beds or coal fields, and *which* as 'mines' are excluded from the preemption act of 1841, and which under past legislation are not liable to ordinary private entry, it may be lawful for the President to cause *such* tracts, in suitable, legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre, and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

If counsel can find any coal lands that meet this description, I should like to have them pointed out. What I want is lands that fill this bill. "That where any tracts embracing coal-beds or coal fields, and which as 'mines' are excluded from the pre-emption act of 1841."

At the time this act was passed, the pre-emption act had been in force for twenty-three years, and millions upon millions of acres of the public lands disposed of under it, and in not a single case had coal lands been excluded from its operation.

So, too, in regard to the other clause, "and which, under past legislation, are not liable to ordinary private entry." Where do you find such lands? Coal lands had always been liable to ordinary private entry, and under the "past legislation" from the commencement of our public land system, had been sold at private entry without question, or so much as a doubt being raised as to the propriety of such

sale. If there are any such lands as this act recites, and the President can find them, he may cause them to be offered at private sale, and no harm will be done.

Subsequent legislation satisfactorily shows that Congress did not understand that mineral lands included coal lands The 4th Section of Act of July 2d, 1862, amended July 1st, 1864, granting lands to the Central Pacific Railroad, declared that the use of the term mineral should not include land containing coal or iron. (13 Stat., 358).

The coal land Act of March 3, 1865, gave certain citizens the right to acquire coal lands at twenty dollars per acre. The mineral acts fixed the price of mineral lands at $2.50 and $5.00 per acre, as is well-known.

This fact shows that Congress did not regard coal lands as mineral lands.

Its understanding of what was mineral is plainly shown in the Act of July 26, 1866, 14 Stat., 251. The first section provides that the "*mineral lands* of the public domain," both surveyed and unsurveyed, &c. The second section provides for the patenting of "a vein or lode of quartz, or other rock in place, bearing *gold, silver, cinnabar or copper.*" Section 10 provides: "that wherever prior to the passage of this act upon the lands *heretofore designated* as *mineral lands* which have been excluded from sale, there have been homesteads made, upon which there have been no valuable mines of *gold, silver, cinnabar or copper discovered,* and which are properly agricultural lands, the land settlers or owners shall have a right of pre-emption," &c. The Court will bear in mind that this was the first law that declared that all mineral lands are open to occupation, and it confines the minerals to *gold, silver, cinnabar and copper.*

It would seem that Congress must have considered these as *the minerals,* and mineral lands those only which contained them.

The 11th section of the same act provides that—

> "The Secretary of the Interior may *designate and set apart* such portions of the said lands as are clearly agricultural lands."

This implies that the Secretary may, from the lands which *have been reserved as mineral*, set apart those that are clearly agricultural. There is nothing said about coal.

So, in the "act to quiet land titles in California," passed July 23, 1866, 14 Stat., 218. In section 7 it is—

> "Provided that the right to purchase, herein given, shall not extend to lands containing mines of *gold, silver, copper and cinnabar*."

Here, too, nothing is said about *coal lands*.

The act of July 4th, 1866, concerning lands granted to the State of Nevada and regulating *State selections*, provides that only—

> "Lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale."
> 14 Stat., 86.

Did Congress intend to make one rule for Nevada and another for California?

Other acts of Congress might be cited showing what was considered mineral lands, but it seems to me that it is unnecessary to refer to them, and that it is fair to conclude that coal lands were not considered mineral lands.

III. *The question whether these lands are mineral is a question of fact, and it has been before the Land Department and determined by it, and the United States are concluded by that decision.*

The record shows that the right of the State and the Black Diamond Company was before the Commissioner of the General Land Office, and that all the questions now

made were made before him, and that he finally adjudicated in favor of the State selection. Record, pp. 125–129.

This decision has never been appealed from or set aside. It stands to-day as the final determination of a tribunal which has been created to determine just that class of questions. It is final. That has been determined by numerous authorities, some of which I will proceed to quote, not because this court is not familiar with them, but for the purpose of easy reference:

> "The acts of Congress have given to the registers and receivers of the Land Office the power of deciding upon claims to the right of pre-emption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. *Wilcox* vs. *Jackson*, 13 Pet., 513.
>
> "If, therefore, they acted within their powers as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final. *Lytle* vs. *Arkansas*, 9 How., 333.
>
> "That their decision upon the facts, which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts." *Johnson* vs. *Tousley*, 13 Wall., 73.

> "It is a rule resting on reason and authority, that *in the absence of fraud*, or fraudulent imposition, on the officers of the land department, their determination of matters of fact is not open to revision in the courts. * * * * They may err in their judgment as to the weight of testimony, or may decide directly against the evidence, but no appeal lies to the courts to correct such errors."
>
> *Hosmer* vs. *Wallace*, 47 Cal., 471.

> "The courts will not pass upon the sufficiency of the evidence upon which the decision of the land officers was based in each case, but it must be shown that their

decision was induced by fraudulent practices of the defendant, whereby the plaintiff was deprived of his right to pre-empt."

Burrell vs. *Hard*, 48 Cal., 223.

"The proposition is too well settled to require a citation of authorities, that the decisions of the land department upon questions of fact are not subject to review by the courts."

Powers vs. *Leith*, 53 Cal., 713.

"Under the Act of Congress of July 23. 1866, * * * * *if the land department, in the case of a purchaser from the State, decides in favor of the regularity and validity of these proceedings, and lists the land over to the State, * * * * the decision is conclusive as against the United States.*"

Wilkinson vs. *Merrill*, 52 Cal., 424.

"But for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and, perhaps, under special circumstances, to the President."

Shepley vs. *Cowan*, 91 U. S., 340.

"The Supreme Court of Nebraska holds that the land department decided this question of fact erroneously, and that Stark never filed or made the former declaratory statement that he was a qualified pre-emptor for the land patented to Van Pelt, and decrees a conveyance to him by Baldwin of the legal title vested by patent."

Stark vs. *Baldwin*, 7 Neb., 114.

"It has been so repeatedly decided in this Court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that Department the decision is *conclusive everywhere* else as regards *all questions of fact*, that it is useless to

consider the point further. Where fraud or imposition has been practiced on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case, as applicable to the facts. Courts of Equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. *Johnson* vs. *Towsley*, 13 Wall., 72; *Gibson* vs. *Choteau*, *Id.*, 92; *Shepley* vs. *Cowan*, 91 U. S., 330; *Margeny* vs. *Frisbie*, 101 *Id.*, 473;"

Baldwin vs. *Stark*, 107 U. S., 465.

In the present case the question whether the land was mineral, (assuming that coal lands are mineral lands,) was one of fact dependent upon various considerations such as the extent of the coal. The comparative value of the land for coal or for agriculture, how much coal must exist to make it coal land, the character of the coal, to what extent the deposit had been worked out and the like. The question was one about which different persons might honestly differ, and that shows the propriety of the rule as to the conclusiveness of the decision of the Land Department, for there should be a point at which litigation must forever cease.

The case of the *United States* vs. *Minor*, 114 U. S., 233, is not in conflict with doctrines announced in the foregoing cases. In that case the United States brought suit to set aside a patent for 160 acres of land patented to Minor under the pre-emption law. It was shown that the patent was obtained by fraud and perjury; that Minor had never been on the land or performed a single act required by law to be performed.

Mr. Justice MILLER, in delivering the opinion of the Court, said:

"Here no one question was in issue, no issue at all was taken. No adversary proceeding was had. No

contest was made, the officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue the patent."

And in commentating on the case of *Vance* vs. *Burbank*, he said:

"In such a case where there was full hearing rehearing, and issues made and tried the observation of the Court, that the decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute is, well founded. It has been often said by this Court that the land officers are a special tribunal of a *quasi* judicial character, and their decision, *on the facts before them*, is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, that *those parties* are concluded as to *all facts* thus in issue, by the decision of the officers. But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value."

VI. *The acts of 1864 and 1865 did not withdraw coal lands from the right of the state selection, and the state became vested at the time of the selection.*

Neither of these acts declared that coal-beds or veins were mineral lands or that state relations could not be made of them. The act of 1853 clearly gave the right to the state to select coal lands. This right will not be presumed to be taken away. The intention to deprive the state of it, ought to be clear.

The right of selection became fixed at the date of the survey.

Sherman vs. *Buick*, 93 U. S., 214.

The title became perfect when the state locating agent notified the Surveyor General of the selection.

Lessenir vs. *Price*, 12 How., 60;
Huff vs. *Doyle*, 93 U. S., 562.

The Black Diamond Company is entitled to no special consideration in this case. It was a naked trespasser on the land. It has worked out all the coal and removed its improvements, and now, when it has not a shadow of a legal right to the premises, it seeks to have the patent issued to these defendants, by the proper department, after a full and fair hearing, set aside and held for naught; and its object in so doing is to make a defense to a civil suit now pending against it.

In conclusion, let me inquire why should the United States set aside this patent?

If it should be set aside and the land should turn out to be coal land it would be open to the first taker at not less than ten dollars an acre, if more than fifteen miles from a completed railroad, and not more than twenty dollars if within fifteen miles of such road. Act of March 3, 1873, 17 State 607, Rev. Stat, sec. 2347. And the government would be under obligation to furnish the State with another half section of public land. I submit that the interest of the United States is not of such a character as to require that the decree prayed for should be granted.

The grounds on which like cases have heretofore been maintained are two-fold. First, where the Government was under obligation to convey the land to some third person, and it had put it out of its power to do so because of having patented it to some one who was not entitled thereto; and

second, where the conduct of the grantee had been so grossly fraudulent, as to require on the score of public policy, that he should be made an example of and deprived of the facts of his wrong doing. The Minor case was of this character. The present case has none of these elements. No one has any claim upon the land, and the defendants have not been guilty of any fraud.

It is beneath the dignity of this great and powerful nation, with fifty millions of people and fifty billions of money, to allow a suit to be brought, *at the expense and cost of a third party*, against two of its loyal subjects.

WALTER H. SMITH,
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118-271

FILED
MAR 26 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

JOHN MULLAN AND FRANCIS AVERY, APPELLANTS, *vs.* THE UNITED STATES. } No. 203.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1885.

JOHN MULLAN AND FRANCIS AVERY, Appellants, *vs.* THE UNITED STATES. } No. 203.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the United States.

The object of this bill is to have decreed that the north half of section 8 in township 1 north, range number 1 east, Mount Diablo meridian, situate in Contra Costa County, in the State of California, containing 320 acres, was erroneously and without authority listed to the State of California by the Secretary of the Interior in the room of, and as an indemnity for, the east half of

section 16, township 2 north, range 8 west, Mount Diablo meridian, and, as a consequence, that the patent issued therefor by the State to the defendant Avery is null and void.

The case, disembarrassed of unnecessary detail, is simply this: The act of 3d March, 1853, entitled "An act to provide for the survey of the public lands of California, the granting of preemption rights therein, and for other purposes" (10 Stat., p. 244), extends (section 6) the preemption laws of the 4th September, 1841, "with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided," to the public lands of California, whether surveyed or unsurveyed, except sections 16 and 36, which were reserved for school purposes, and lands otherwise reserved or covered by foreign grant, *and mineral lands.*

By the 7th section of this act it is provided that if it shall fall out on survey that one or both of any section 16, or 36, or any part thereof, has or have been settled upon or reserved for public uses or taken by private claims, then the State

may have other equivalent public land under the provisions of the act of May 26, 1826, subject to the approval of the Secretary of the Interior.

The claim of the State to the extent of one-half part of a section (16) having been anticipated in some way, the State selected the half section covered by the patent as indemnity.

It turns out, however, that the half section thus selected, was mineral land containing large deposits of coal, and that before and at the time of the selection and listing and issuing of the patent a company was engaged in taking coal from the land on a large scale.

Whether the patentee or his equitable assignor, the defendant Mullan, actually knew the fact, is not clear, but that such was the case is firmly established by the testimony, as the circuit judge says in his opinion (R., p. 130).

The question involved in the cause is one of *authority.* If the land in question was reserved by the United States from entry or school pur-

poses, the State acquired no title and her patent conveyed nothing and constitutes a cloud on the Government title that should be removed.

In this view of the case an analysis of the defendants' answer becomes entirely unnecessary.

On 29th March, 1882, a decree was entered vacating the patent, declaring that the land was illegally listed to the State, and enjoining the defendants from thereafter asserting title under the patent. (R., pp. 34, 35.)

This suit is prosecuted at the expense and cost and in the interest of the Black Diamond Coal Company, as appears by the letter of Mr. Attorney-General Devens, set out in the answer (R., p. 24), and as is stated by the court in its opinion (R., p. 137).

We are informed, casually, that a brief will be filed nominally for the United States by counsel representing the Black Diamond Coal Company.

Nevertheless, we have not felt at liberty to leave the case in the hands of private counsel,

for, after all, the case proceeds on the theory that the *locus in quo* is part of the national domain, and no pretense of legal right to it is set up by the coal company, whatever its ulterior designs and purposes may be.

It would seem that the affirmance of the decree on this record, and in the light of the opinion of the learned circuit judge, is inevitable.

WM. A. MAURY,
Assistant Attorney-General.

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In the Supreme Court of the United States.

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No. 203.

JOHN MULLAN AND FRANCIS AVERY,
Appellants,

vs.

THE UNITED STATES.

Brief and Argument for Appellee.

WILLIAM W. MORROW,
Counsel for Appellee.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

Supreme Court of the United States.

OCTOBER TERM, 1885.

JOHN MULLAN AND FRANCIS AVERY, APPELLANTS,

v.

THE UNITED STATES.

No. 203.

Appeal from the Circuit Court of the United States for the District of California.

WILLIAM W. MORROW, Counsel for Appellee.

STATEMENT OF CASE.

The sixteenth and thirty-sixth sections of land in each township in California were granted to the State for school purposes by the act of Congress of March 3d, 1853. (10 Statutes-at-Large, page 244.) By the seventh section of that act indemnity was provided for such sections or parts thereof as might be lost to the State by reason of settlement prior to the survey, or because of reservation for public uses, or of being taken by private claims. Among the lands lost to the State by reason of falling within the boundaries of a private land claim was

the E. ½ of section 16, T. 2 N., R. 8 W., Mount Diablo meridian. In lieu of this land, a State selection was attempted to be made on the 25th of June, 1865, of the north half of section 8, T. 1 N., R. 1 E., Mount Diablo meridian. (Transcript of Record, p. 40.) On the 28th of August, 1868, John Mullan applied to John W. Bost, then Surveyor-General of California, to purchase and locate this tract of land, (Transcript of Record, page 141,) and such proceedings were thereafter had that the land was listed to the State by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, on the 3d day of January, 1871, (Transcript of Record, p. 41,) and a patent was issued by the State to Francis Avery, April 6, 1871. (Transcript of Record, p. 45.)

The land so selected, listed, and patented was and is "mineral land," containing beds of coal or coal-fields.

To determine the question whether this land was open to selection by the State this suit was brought by a bill in equity in the Circuit Court of the United States for the District of California, under the authority of the Attorney-General of the United States.

The bill alleges that all acts pertaining to the allowance of the selection and location by the State of California of said tract of land, and the listing of the same to the State of California by the United States, and the approval of the same by the Secretary of the Interior of the United States, were had and done unadvisedly through inadvertence and mistake, and without color of law, and contrary to the statutes in such case made and provided, and that all the proceedings in connection therewith are null and void.

The Circuit Court, by its decree, found that the lands in question were not subject to selection or to be listed to the

State in lieu of school lands, and by reason thereof the State of California never had or acquired in any manner any lawful title to the land and premises in controversy, and that all the proceedings had and taken for the purpose of acquiring the right to have the patent issued to Francis Avery were had and done without authority of law, and were illegal and utterly void as against the United States and all parties deriving title therefrom.

BRIEF AND ARGUMENT.

THE CHARACTER OF LANDS INTENDED TO BE GRANTED BY THE ACT OF MARCH 3D, 1853.

The act of August 3d, 1854, (10 Statutes-at-Large, page 346,) provides as follows: "That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee-simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been, or may hereafter be, certified by the Commissioner of the General Land Office under the seal of said office, either as originals or copies of the originals or records, shall be regarded as conveying the fee-simple of all the lands embraced in such lists *that are of the character contemplated by such act of Congress and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall*

be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

Considering the liberality of the Government in disposing of its public lands, the limitation imposed by this act is most important. It shows a positive and unmistakable purpose to restrict its instrument of conveyance in every case to the precise character or class of lands intended to be conveyed by Congress, and to absolutely exclude all other kinds of lands, however formal or regular may have been the proceedings leading up to the conveyance.

The lands embraced in the lists must be of the "character contemplated" by the act of Congress containing the grant, and they must be the lands "intended to be granted thereby," and the lists, so far as they contain any other land, is "perfectly null and void."

WHAT WAS THE CHARACTER OF THE LAND INTENDED TO BE CONVEYED BY THE ACT OF MARCH 3D, 1853?

The pre-emption act of September 4, 1841, was in the nature of a concession for the occupation of the agricultural lands of the United States. The essential conditions of pre-emption are actual entry upon, residence in a dwelling, and improvement and cultivation of a tract of land. The several pre-emption acts give a preference to the settler who should go upon the land to reside and make it his home. This purpose of the statute is also made manifest by the exclusion of other lands from entry. The act of 1841 provides that "no lands on which are situated any known salines or *mines* shall be liable to entry under and by virtue of the provisions of this act." (5 Statutes-at-Large, page 456, sec. 10.)

The act of March 3d, 1853, extended the pre-emption laws of 1841 over the public lands in California, whether surveyed or unsurveyed, "with the exception of sections

16 and 36, which shall be and hereby are granted to the State for the purpose of public schools in each township," "and excepting also * * * the *mineral lands*." Section 7 provides "that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections * * * other lands shall be selected by the proper authorities of the State in lieu thereof, * * * *nor shall any person obtain the benefit of this act by a settlement or location on mineral lands*."

In section 12 there is a grant of two entire townships to California for a University, to be selected by the governor of the State, with a proviso "*that no mineral lands * * * shall be subject to such selection*."

In section 13 there is a grant of ten sections of land for public buildings to be selected by the governor, with a proviso "*that none of said selections shall be made of mineral lands*."

In section 7 of the act of May 30, 1862, (12 Statutes-at-Large, page 409,) relating to settlement on unsurveyed lands in California, it was provided that "*the provisions of this section shall not be held to authorize pre-emption and settlement of mineral lands, which are hereby exempted from the provisions of this act*."

The act of July 23, 1866, entitled "An act to quiet land titles in California," (14 Statutes-at-Large, page 218,) had for its object the confirmation to the State of certain irregular selections under grants of Congress, but in order that this confirmation should not be extended beyond the legitimate purpose of the statute it was provided "that no selection made by said State, contrary to existing laws, shall be confirmed * * * *to any mineral land*."

All these provisions show beyond question the purpose of Congress to restrict the grants contained in the act of

March 3, 1853, to agricultural lands, and to exclude mineral lands from the operation of the original grant and from lieu selections. This last proposition is perfectly plain, since to hold otherwise would be to deprive of all meaning that portion of section 7 of the act of March 3, 1853, which provides, "*nor shall any person obtain the* BENEFIT *of this act by a settlement or location on mineral lands.*" Manifestly one of the BENEFITS of the act was that provision of section 7 providing for selections in lieu of lands lost to the State by reason of settlements before survey, reservations for public uses, and private claims.

In the court below the learned judge of the Circuit Court makes the further point that "if sections 16 and 36 do not pass by the terms of the statute there certainly is no good reason for permitting the same kind of land to be selected under section 7 in lieu of sections 16 and 36." (Transcript of Record, page 132.)

In Mining Co. *v.* Consolidated Mining Co., (102 U. S., 174,) this Court discussed this whole question very fully.

"The purpose of these provisions," says the court, "was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise."

"It is a strong corroboration of this view that Congress, in sec. 12 of this same statute giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State."

"We find a similar provision in the grant to the Pacific

Railroad Companies, whose road it was known would pass through some of these mineral regions. By the fourth section of the act of 1864 (13 Statutes, 356) it is declared that neither that act nor the act of 1862 shall be held to include in the grant 'any Government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands.'"

"As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted, in 1866, a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

"Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes, besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State."

"It follows from the findings of the Court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant."

"*It seems equally clear to us that the land is excepted from the grant by the terms fo the seventh section of the act of* 1853."

From this statement of the law it appears that the lands intended to be conveyed by the act of March 3d, 1853, were only agricultural lands, and that mineral lands were absolutely excluded from the operation of the terms of the grant. But it appears that prior to the passage of the act of July 1, 1864, providing for the sale of coal lands, the Land Department did not treat coal lands or coal mines as mineral lands within the meaning of the prior acts of Congress. It is evident that this was an erroneous interpretation of the law, but as all the proceedings in this case took place after Congress had provided in the act of July 1, 1864, for the disposition of its coal lands, it is only material for us to inquire as to the status of coal lands after that date.

WERE COAL LANDS SUBJECT TO STATE SELECTION IN LIEU OF SECTIONS 16 AND 36 AFTER JULY 1ST, 1864?

The question here is, what was the character of the land in controversy, as classified by the laws of the United States, when it was listed to the State on the 3d day of January, 1871; or, for the purpose of this case, we may even go back and inquire as to the proper classification of the land at the time Mullan made his application to purchase on the 28th day of August, 1868. The act of July 1, 1864, providing for the sale of coal lands, under certain conditions, at twenty dollars per acre, had been in existence then over four years. Section one of this act provided "that where any tracts embracing coal-beds or coal-fields constituting portions of the public domain, and which, as 'mines,' are excluded from the pre-emption act of eighteen hundred and forty-one, and which, under past legislation, are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale

to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre," &c. (13 Statutes-at-Large, page 343, amended by act of March 3d, 1865, 13 Statutes-at-Large, page 529.)

It does not seem to require any argument to show that after this act was passed coal lands were not subject to State selection in lieu of sections 16 and 36.

Their classification as mines, the price at which they were to be sold, and their method of sale, conclusively determine that they were not open to such selection.

THE CHARACTER OF THE LAND IN CONTROVERSY.

The testimony shows that since the spring of 1861 the tract of land known as the north half of section 8, T. 1 N., R. 1 E., Mount Diablo meridian, had been known as coal lands holding great coal-beds or coal-fields, and from which large quantities of coal had been extracted.

Benjamin Jones went to this land in 1861 to look after work as a coal miner. He found they had run two tunnels in there previous to that; one of them they called the Old Cumberland tunnel was run in on the coal, and what was called the Upper Black Diamond was run through a sand rock through the stratification about three hundred feet across the strata, and tapped the vein. The business carried on there at that time (1861) was coal mining and shipping coal. There were probably about sixteen miners there then. There was a hotel there and an office, and sleeping-houses for the men that were boarding. The men were engaged entirely in mining on the half section of land. Two coal bunkers were built there in the fall of 1861. The coal was hauled about six miles down to New York landing at the junction of the San Joaquin and Sacramento rivers. The Company had to build roads to get down to the plains, and it costs a good deal to build them down

through the cañons, including bridges, &c. (Transcript of Record, page 61.) In 1865 an expensive trestle-work or incline was built from an available point below to the mouth of the mine, which cost from $25,000 to $30,000. The Manhattan Coal Mining Company, the Union Coal Mining Company, the Eureka Coal Mining Company, the Pittsburg Coal Mining Company, and the Independence Coal Mining Company had been or were then carrying on coal mining operations in the immediate neighborhood, besides the Black Diamond Coal Mining Company, which was being worked on the north half of section 8. (Transcript of Record, page 61.) The Cumberland mine was also being worked on section 8. (Transcript of Record, page 67.) In 1864 and '5, Nortonville began to grow into a town. Its inhabitants were coal miners. (Transcript of Record, page 63.) The land is on the hillside, very steep and rocky generally; it was not agricultural land or land to cultivate. It was mining land in its character generally. "Where you find mines it is the roughest country generally," says the witness Jones. He never tried a garden there and never saw one. (Transcript of Record, page 64.) In 1867 the Black Diamond Coal-Mining Company had built a railroad from New York landing up to the mine, and had built large new coal bunkers at the foot of the hill at Nortonville; some of the bunkers would hold two thousand tons or more; hoisting apparatus of the best kind was put in place, together with stationary engines. In 1867 several hundred people were there, mainly employed as miners in the Black Diamond Mine. (Transcript of Record, page 65.) Mr. Jones testifies that from his experience as a coal miner, and from what he saw during the years he was there, the north half of section 8 was decidedly coal land. He would not consider it had any value except for that purpose. He would not take

it for a gift for any other purpose. (Transcript of Record, page 66–7.)

G. H. Thompson, Deputy United States Surveyor, under an order and in accordance with instructions from the United States Surveyor-General, surveyed this land in 1864. At that time several coal mines were being worked, and prospecting for coal was going on in the way of running tunnels and sinking shafts. Thompson says that several mines were then open, in which parties were then mining and taking out coal, and there were coal bunkers, coal chutes, and so on, and several tunnels. (Transcript of Record, page 73.) His field-notes specify the Cumberland Coal Mining Company's houses and improvements, and the coal shed of the Black Diamond Coal Mine and tunnel. (Transcript of Record, page 116.) He speaks of the work as pretty extensive. (Transcript of Record, page 73.) They had taken out a great deal of coal there. The Black Diamond had a tunnel several hundred feet in length, and at the end of the tunnel an incline going to a considerable depth in the earth.

At the mine there was a tunnel that ran in several hundred feet, where they had out a quantity of coal, which they called the old tunnel. There was another near and to the west of it which had been run in several hundred feet. The end of this tunnel was just in the face of the vein. He went into the tunnel with the superintendent of the mine and saw the vein and the coal. There were built extensive sheds and coal bunkers on the ground. In the immediate vicinity there was a mining camp, a hotel, and a number of houses and improvements. He says that many coal mines were being worked and opened in the vicinity. At the time of his survey he had heard parties speak of the district as being a coal district—coal mines there. The north half of section 8 and the south half of

section 5 were well known to be coal lands—considered as such. (Transcript of Record, page 74.) In the general description of the lands annexed to his field-notes he says: "The south part of the township is occupied by Mount Diablo, which is very rugged and broken, which renders it unfit for cultivation. The north part, which is subdivided, is thickly settled, and is considered very valuable on account of the large deposits of coal which it contains." (Transcript of Record, page 118.)

Asher Tyler first knew the land in 1860, and saw coal there. (Transcript of Record, page 75.) He bought an interest in the land (possessory right, probably) in 1860, and held it until some time in 1863. The property was then known as the Cumberland and Black Diamond Coal Mine. (Transcript of Record, page 76.) The population in 1864 was entirely a mining population. The witness never knew of the north half of section 8 being used for agricultural purposes. He never knew of anything being planted or cultivated at all there, not even a tree. The value of the land from 1860 on was the coal deposits; nothing else. (Transcript of Record, page 77.)

The population in Nortonville in 1866 was 500 or 600 people. Most of them engaged in mining; some of them were building a railroad from New York landing to the mine, to transport the coal. It was a pretty lively place. The railroad was first operated by horse-power, and afterwards by steam, by use of the locomotive. They placed down steel rails and ran cars over the track attached to a locomotive. (Transcript of Record, page 78.) That railroad so constructed has continued up to the present time. A public school for the children of miners was opened in 1867 or '8 in Nortonville, and a church was established there in 1870. The population of Nortonville in 1868 estimated at 1,500 people. There was nothing there to

support this population except the mining operations. (Transcript of Record, page 79.)

John A. Davis was a merchant at Nortonville from 1869 to 1874. The Black Diamond Coal Mine is in the town. The mine is all there is of the town. Witness knew the land in question. It was simply coal land; there was a mine there; that was all, nothing else. Nortonville had a population of about 1,500, supported by the Black Diamond Coal Mines. (Transcript of Record, page 82.) The land in question was not used for agricultural purposes. It was not fit for that. It was a barren, dry piece of land that nothing would grow on at all; no water there; nothing would grow there, trees or anything; it was anything but agricultural land. The only thing that gave the land value was the coal that was in it. There was never anything that would grow there at all anywhere around there, not even grass. The nearest point where agricultural operations were carried on was about three miles and a half. (Transcript of Record, page 83.) The land was about 1500 feet above the level of the San Joaquin river. It was very rocky and sandy—sandstone and hilly. From 1868 to 1874 the land was known as coal lands. (Transcript of Record, page 84.)

As all the witnesses testify to these extensive and necessarily well-known mining operations on the north half of section 8, it is difficult to understand how Captain Mullan failed to be informed of the existence of these mines, and that the land was coal land, at the time he made his application to purchase it on the 23d of August, 1868.

It will be noticed also in the evidence that, at the time of this application, Surveyor-General Bost called the attention of Captain Mullan to the fact that the land was in the neighborhood of the Mount Diablo coal mines, and he told Mullan that he did not like to accept or approve

it; that he thought it was coal land, and he did not like to accept the location. Captain Mullan replied that he had the United States Register's acceptance, and that it was the duty of witness to approve it any way, even if he did know it was coal land; that it was his duty to accept and approve it; that it was State land, and that the Register, Mr. Swift, had accepted the State application for it; that he, Mullan, could compel the witness to approve it by mandamus, or something of that kind; that it had been accepted by the Register, and the witness had no other course to pursue but to accept. General Bost believed the land to be coal land. It was so close to the mining region that he believed it to be coal land. (Transcript of Record, pages 51–53.)

It also appears that at this time Captain Mullan was a land or real-estate agent and land attorney in San Francisco. (Transcript of Record, pages 51 & 88.) He knew or might have known from the testimony of record in the U. S. Land Office as to the coal mines upon this land, and the large settlement of miners there. He told General Bost that Mr. Swift, the U. S. Register, had accepted the State application for the land. How did Captain Mullan know this without an inspection of the plats and surveys in the U. S. Land Office, where the fact that the land was coal land was fully set forth? (See plat of sections 5 and 8 in Transcript of Record, and field-notes.)

It is also a significant circumstance in this connection that although Captain Mullan is a party to this action, and still interested with Mr. Avery in the claim to this land, he has not appeared as a witness in the case nor has his deposition been taken in support of their supposed rights. It is respectfully suggested that his silence under the circumstances has all the force of an admission that he knew or had reason to know the character of the land

at the time of his application to purchase. It furthermore appears from the evidence of Mr. Avery that, although the State was selling its agricultural lands at $1.25 per acre, he first took Mullan's certificate of purchase, upon which Mullan had only paid twenty per cent. and interest for one year in advance, amounting altogether to $101.65, (Transcript of Record, page 139,) as collateral security for a loan of $1,000. (Transcript of Record, page 119.) Avery then became the purchaser of a half-interest, paid the State the balance of the purchase money, and invested about $2,000 in the enterprise. The evidence shows also that on the same day upon which the certificate of purchase was assigned to him (March 28, 1871,) Avery also took an assignment of a supposed cause of action against the Black Diamond Coal Company for waste, injury, &c., and for taking coal from the land. (Transcript of Record, page 143.) Notwithstanding Mr. Avery's recollection on the subject of this transaction, it is perfectly evident from all the established facts in the case that at the time of the issuing of the State patent both Mullan and Avery must have known that this land was in the occupation of the Black Diamond Coal Mining Company, and that it was only valuable for the coal contained in it, and for the supposed value of the coal that had been taken out, in a cause of action against the Black Diamond Coal Company for its extraction. This last proposition is established by the fact that, soon after Mr. Avery had obtained his patent, he commenced an action against the Company for possession of the land, and demanded something over $1,300,000 damages for the amount of coal theretofore taken from the land, and which he testified was not a hazardous guess but was an estimate based upon the best information he could get. (Transcript of Record, page 97.)

The evidence shows conclusively that the land had no value for agricultural purposes; it was rocky, precipitous, barren, and incapable of cultivation. With all the population in the neighborhood, nothing was ever grown upon it. It had absolutely no value except for its veins and beds of coal. At the time Captain Mullan made application to purchase the land it was known to be valuable for this coal and for that only. It was known furthermore that the coal was in sufficient quantities to render the land available and valuable for mining purposes.

This was not the character of land intended to be conveyed by the act of March 3d, 1853, and therefore did not legally pass to the State by reason of being embraced in list of selections No. 19, as certified by the General Land Office December 28th, 1870; and that this list did not operate to convey an indefeasible title to lands not properly embraced within the terms of the grant is shown by the express reservation in the list itself, wherein it is provided that it is "*subject to any valid interfering rights which may have existed at the date of the selection.*" (Transcript of Record, page 42.) The purpose of Congress not to dispose of its coal lands except as provided in the act of July 1, 1864, and the supplemental act of March 3, 1865, was an "*interfering right*" which existed at the date of the selection of the land in controversy. The United States now asserts this right on the ground of fraud, mistake, misconstruction of the law, or inadvertence in the selection and listing of the land.

"Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially,

not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."

U. S. *v.* Stone, 2 Wall., 525.

When the officers of the Land Department have misconstrued the law applicable to the case as established before the Department, and thus have denied to parties rights which upon a correct construction would have been conceded to them, or where misrepresentations and fraud have been practised necessarily affecting their judgment, the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

Quinby *v.* Conlan, 104 U. S., 420.

In the case of "a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that Department of the Government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take such measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the Department. This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose."

Steel *v.* Smelting Co., 106 U. S., 454.

In this case the Government now alleges that the color of title contained in list No. 19 was obtained in direct violation of law, by fraud or mistake, and that there was no lawful authority, right, or jurisdiction in the Land Department to so dispose of the land.

The record shows that the Commissioner of the Land Office has acted on both sides of this controversy between the Black Diamond Coal Mining Company and Avery, but his action, one way or the other, is immaterial. If he could not give the State land, in the first place, he cannot confirm his void title in the hands of Avery.

It is not a question of judgment. It was a clear violation of the coal-land laws to approve any State selection of these lands. The Secretary of the Interior has no more jurisdiction to award them to the State of California as an indemnity selection than he would have to include in such a selection a fort, a light-house, or land upon which the Government has established a hospital, a military or other reservation. His act was in violation of law. The United States cannot be divested of the title to its domain by the mere act of a ministerial officer who acts outside of the law, nor can such officer confirm the void act. Whatever may be said of the rights of parties, based on the want of previous legislation, these lands were legislated upon by Congress in 1864 and 1865 clearly and unmistakably. They were dealt with by special legislation long before Mullan proposed to purchase them from the State, and long before the State included them in a State selection for his benefit.

We respectfully ask that the judgment of the Court below be affirmed.

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